163 US 662

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 812. 461

M. F. BALL, JOHN C. BALL, AND R. E. BOUTWELL, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

FILED SEPTEMBER 28, 1894.

15696.

It is respectfully submitted that the judgment should be affirmed.

JUDSON HARMON,
Attorney General.
HOLMES CONRAD,
Solicitor General.
EDWARD B. WHITNEY,
Assistant Attorney General.

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1 Be it remembered that at a regular term of the circuit court of the United States for the eastern district of Texas, in the fifth circuit, begun and held at the city of Paris, in said district, on the first Monday, the same being the second day of April, 1894; present and presiding, the Honorable David E. Bryant, United States district judge, and which term adjourned on the fourteenth day of July, 1894, the following cause came on for trial, to-wit:

THE UNITED STATES
vs.
M. F. BALL ET AL. } Charge: Murder.

2 Be it remembered that on this the 20th day of April, A. D. 1891, there was begun and holden in the court rooms in Paris, Texas, a regular term of the honorable circuit court of the United States for the eastern district of Texas at Paris.

Present and presiding, Hon. D. E. Bryant, judge, also present, Robt. E. Hannay, U. S. attorney, J. J. Dickerson, U. S. marshal, C. Dart, clerk, and Frank Lee, asst. U. S. attorney, when the following proceedings were had, to-wit:

* * * * * * *

THURSDAY, *May 7th*, 1891.

Court met pursuant to adjournment.

Presiding and present as on yesterday.

* * * * * * *

This day came the grand jury and, a quorum being present, presented in open court the following bills of indictment, to-wit:

* * * * * * *

THE UNITED STATES
vs.
M. F. BALL, J. C. BALL, & R. E. Boutwell. } Charge: Murder.

Each of which bills of indictment is ordered to be filed by the clerk.

3 In the name and by the authority of the United States of America.

In the circuit court of the United States of America for the eastern district of Texas, in the fifth circuit.

At a stated term of the circuit court of the United States of America for the eastern district of Texas, in the fifth circuit, begun and held at Paris, Texas, within and for the district and circuit aforesaid, on the third Monday, the same being the twentieth day of April, in the year of our Lord eighteen hundred and ninety-one, and continued by adjournment to and including the seventh day of May, in the year of our Lord eighteen hundred and ninety-one.

Eastern district of Texas, Sct.: The grand jurors of the United States of America, duly elected, impanneled, tried, sworn, and charged to inquire into and due presentment make of offenses against the laws of the United States of America, in and for the district and circuit aforesaid, on their

oath in said court present: That one M. F. Ball and one J. C. Ball and one R. E. Boutwell, late of Chickasaw Nation, Pickens County, Indian Territory, in the district and circuit aforesaid, on the twenty-sixth day of June, in the year of our Lord eighteen hundred and eighty-nine, in Pickens County, in the Chickasaw Nation, in the Indian Territory, the same being annexed to and constituting a part of the said fifth circuit,
4 and annexed to and constituting a part of the eastern district of Texas, for judicial purposes, and being within the jurisdiction of this court, did unlawfully, fraudulently, and feloniously, and with their malice aforethought, and with the malice aforethought of each of them, and with a certain deadly weapon, to wit, a certain gun by the said M. F. Ball, J. C. Ball, and R. E. Boutwell then and there held, make an assault in and upon the body of one William T. Box, with said gun held as aforesaid, said gun being then and there loaded and charged with gunpowder and leadden balls, then and there held and used as aforesaid, the said M. F. Ball, J. C. Ball, and R. E. Boutwell did then and there shoot off and discharge the contents of said gun at, in, and upon the body of said William T. Box, inflicting thereon a mortal wound, of which mortal wound the said William T. Box did languish, and languishing did then and there instantly die, and did then and there die within a year and a day after the infliction of the said mortal wound as aforesaid.

And the said grand jurors aforesaid, upon their oaths aforesaid, do say that upon the day aforesaid, at the place aforesaid, with said deadly weapon aforesaid, in the manner aforesaid, and used as aforesaid, the said M. F. Ball, J. C. Ball, and R. E. Boutwell, did unlawfully, feloniously, and with their malice aforethought, kill and murder the said William T. Box; the said M. F. Ball, J. C. Ball, and R. E. Boutwell, and each of them
5 being then and there white persons, and not Indians nor citizens of the Indian Territory, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United State' of America.

J. E. ELLIS,
Foreman of the Grand Jury.
FRANK LEE,
Asst. U. S. Attorney, Eastern District of Texas.

(Endorsed:) No. 230. The United States vs. M. F. Ball et al. Offense: Murder. A true bill. J. E. Ellis, foreman of the grand jury. U. S. witnesses:

Mrs. Lucy B. Mayfield, Burneyville, I. T.
John Beaty, " " "
Nannie Blunt, " " "
Perry C. Spitter, " " "
Wm. Anglin, " " "
Robert Blunt, " " "
Wat R. Cornish, " " "
Bird Ashburn, " " "
Heck Thomas, Fulso, I. T.

Returned and filed in open court 7th day of May, 1891.

C. DART, *Clerk.*
By H. H. KIRKPATRICK, *Deputy.*

Sec. 5339.

(Further endorsed:) U. S. witnesses con'd.

J. F. Hone, Burneyville, I. T.
E. S. Burney, " " "
J. P. Cross, " " "
Harmon Horne, " " "
George Williams, " " "
Heck Thomas, Ft. Smith, Ark.
John Cornish, Burneyville, I. T.
A. S. Kemper, " " "
Watson Jones, " " "
John Hays, " " "
Dora Mays, " " "
Overton Love, " " "
Barch, " " "
Christofer, " " "
Kener Conley, " " "
Mrs. Rider, " " "
6 L. T. Blount, Healdton, " "
Wm. Frazier, Burneyville, " "
Hiram Sanders, Watts, Ark.
D. W. Smith, Burneyville.
Charles Box, "
Maggie Forman, Nineka, I. T.
Sebe Mayfield, Stringtown, I. T.

(Further endorsed:) We the jury find against the special plea of the defendant M. F. Ball as to the jurisdiction of the court, and we further find against the special plea of defendants, M. F. Ball, J. C. Ball, and R. E. Boutwell as to former trial: And we the jury find the defendants, M. F. Ball, J. C. Ball, and R. E. Boutwell, guilty of murder in the Indian country, as charged in this indictment.

D. R. BLAIR, *Foreman.*

May 5, '94.

In the United States circuit court, eastern district of Texas.

UNITED STATES *vs.* M. F. BALL ET AL. } No. 230.

And now comes M. F. Ball, one of the defendants in the above cause, and for special plea herein says:

First. That heretofore, on or about the 30th day of November, A. D. 1889, he was tried and acquitted at Paris, Texas, in a court of competent jurisdiction to-wit: In the circuit court of the United States for the eastern district of Texas, upon an indictment, numbered 3 in said court, duly and legally presented therein, charging this defendant jointly with J. C.
7 Ball and R. E. Boutwell, with the same identical offense that is charged in indictment #230 herein, and upon which he is now called to answer. That indictment #3 aforesaid charged this defendant and his co-defendants with the same identical overt acts, i. e., shooting William T. Box, that they are now charged with in indictment #230 herein.

Second. That he was duly arraigned and pleaded not guilty to the charge in the said indictment #3; that thereupon he was tried before a jury of twelve men, duly and legally selected, empaneled, and sworn to try the issue so joined, in the United States circuit court for the eastern district of Texas, holding session at Paris, Texas, and being the court wherein said indictment was duly and legally presented by a grand jury duly organized by said court.

Third. That on the 3rd day of November, A. D. 1889, the jury so selected, empaneled, and sworn, after hearing the evidence and the charge of the court, returned into court the following verdict to wit: "We the jury find the defendants J. C. Ball and R. E. Boutwell guilty, as charged in this indictment, and we find M. Fillmore Ball not guilty. A. P. Ball, foreman, Nov. 3rd, 1889." The court received and filed said verdict, and then and there rendered its judgment as follows: "It is therefore ordered by the court that the defendants, J. C. Ball and R. E.
8 Boutwell, are guilty as charged in the indictment herein and as found by the jury, and it is ordered that they be remanded to the custody of the marshal, and be by him committed to the county jail of Lamar County to await the judgment and sentence of the court. It is further ordered that the defendant M. F. Ball be discharged and go hence without day." All of which proceedings appear upon the record of said United States circuit court in and for the said eastern district of Texas, holding sessions at Paris, Texas, a certified copies of said entries are hereto attached, marked "Exhibit A," and made a part hereof; which said judgment was never vacated, annulled, or set aside in any way.

Fourth. Defendant shows to the court that said indictment #3 aforesaid was a good and valid indictment, and charged this defendant with the commission of a felony, and in so charging charged this defendant with the same overt acts, to wit, the shooting of William T. Box, that are charged in the indictment #230 to which affiant now pleads.

Wherefore affiant pleads former jeopardy and former acquittal upon the same identical offense charged in the indictment in this cause.

Fifth. Defendant says that if he is mistaken as to the bill of indictment #3 as aforesaid, charging him and his co-defendants with the same offense charged in indictment #230, and the court should hold
9 that indictment #3 only charged this defendant and his co-defendants with assault with intent to kill William T. Box, then this defendant for special plea in this behalf shows to the court that the shooting and wounding William T. Box, charged in said indictment #3, is the same identical shooting that is charged in indictment #230 and is one and the same transaction; and that the said William T. Box died before the filing of the indictment #3 against the defendant and his co-defendants, and which fact was known to the dist. atty. who drew the bill of indictment and to the grand jury that presented said indictment No. 3, & that by the terms of said indictment this defendant was charged with assault with the intent to kill said William T. Box, and was tried in said court and acquitted of said offense of assault to kill and all other offenses charged in said indictment. This defendant therefore charges that the United States, by its legally constituted grand jury, district attorney, and circuit court as aforesaid, in the manner aforesaid, and without the consent of this

defendant, carved out of the shooting of William T. Box the offense of an assault to kill, and tried this defendant, of which said offense he was duly and legally acquitted.

Wherefore he pleads said acquittal in bar of any further prosecution for the alleged shooting of William T. Box, as charged in said two indictments.

THE STATE OF TEXAS,
County of Lamar:

10 I, M. F. Ball, defendant mentioned above, on oath say that I am the identical M. F. Ball mentioned in indeitment #3 and No. 230 presented in the circuit court of the eastern district of Texas, having session at Paris, Texas, and that the facts set forth in the above and foregoing plea are true.

M. F. BALL.

Sworn to and subscribed before me this 18th day of April, 1893.

A. D. BROOKS,
Clerk U. S. Dist. Court, E. D. T.

EXHIBIT A.

SUNDAY, *November 3rd*, 1889.

* * * * * * *

THE UNITED STATES
vs.
M. F. BALL, J. C. BALL, & R. E. Boutwell. } 3.

This day came the United States by her attorney, and the defendants in their own proper persons and by attorneys came, and the jury of twelve good and lawful men which heretofore had been tried, empannelled, and sworn as required by law, and having heard the evidence and argument of counsel and received the charge of the court, and having on a former day of this term retired to consider of their verdict, on this day brought into open court their verdict in words and figures as follows, to-wit:

11 "We the jury find the defendants J. C. Ball & R. E. Boutwell guilty as charged in this indictment, and we find M. Filmore Ball not guilty. Nov. 3rd, 1889. A. P. Ball, foreman."

It is therefore considered by the court that the defendants J. C. Ball and R. E. Boutwell are guilty as charged in the indictment herein and as found by the jury, and it is ordered that they be remanded to the custody of the marshal and be by him committed to the county jail of Lamar County to await the judgment and sentence of the court.

It is further ordered that the defendant M. F. Ball be discharged and go hence without day.

In the circuit court of the United States for the eastern district of Texas, at Paris.

I, C. Dart, clerk of the circuit court of the United States for the eastern district of Texas, in the fifth circuit, do hereby certify the foregoing to be a true and correct copy of original orders of court in cause No. 3 on the

criminal docket of said court, entitled The United States vs. M. F. Ball, J. C. Ball, and R. E. Boutwell, as the same now appears of record in my office at Paris, Texas.

To certify which, witness my hand and the seal of said court, at Paris, in said district, this the 2 day of May, A. D. 1894.

[SEAL.] C. DART,
Clerk U. S. Circuit Court, E. D. T.
By H. H. KIRKPATRICK,
Deputy.

(Endorsed:) No. 230. United States vs. M. F. Ball. Special
12 plea of former acquittal & former jeopardy. Filed Apr. 23, 1894. C. Dart, clerk. By H. H. Kirkpatrick, deputy.

In the United States circuit court, eastern district of Texas.

THE UNITED STATES *vs.* M. F. BALL ET AL. } =230.

And now come the defendants J. C. Ball and R. E. Boutwell herein, and for special plea herein they say:

First. That on the 17th day of October, A. D. 1889, the grand jury for the United States of America, empaneled in the circuit court for the eastern district of Texas, holding sessions at Paris, Texas, returned and presented in said court a bill of indictment, numbered 3, against these defendants and M. F. Ball, charging them jointly with the same overt acts that are charged in the indictment numbered 230 that defendants are now called to answer; a certified copy of said indictment =3 is hereto attached marked "Exhibit A" for identification and made a part hereof; that the facts and acts charged in said indictment =3 were and are the same identical acts and transaction charged in the indictment =230 herein.

Second. On the 30th day of October, A. D. 1889, these defendants and their co-defendant, M. F. Ball, was arraigned and placed on
13 trial in said circuit court of the eastern district of Texas, upon all the charges and offenses charged in said indictment =3, as will appear from a certified copy from the record of said court hereto attached, marked "Exhibit B" for identification and made a part hereof.

Third. On the 3rd day of November, A. D. 1889, the jury empanneled in said court in said cause returned into court a verdict in words and figures as follows, viz: "We, the jury, find the defendants J. C. Ball and R. E. Boutwell guilty as charged in the indictment, and we find M. Fillmore Ball not guilty. Nov. 3rd, 1889. A. P. Ball, foreman."

Fourth. Said verdict was received in said cause without any objection from either of the defendants and by the court ordered filed and the jury discharged. Upon the return of said verdict the court then and there entered its judgment in words and figures as follows, towit: "It is therefore considered by the court that the defendants J. C. Ball and R. E. Boutwell are guilty as charged in the indictment herein and as found by the jury, and it is ordered that they be remanded to the custody of the marshal and be by him committed to the county jail of Lamar County to await the

judgment and sentence of the court. It is further ordered that the defendant M. F. Ball be discharged and go hence without day." All of which is apparent from the record in said cause, certified copies of
14 which are hereto attached, marked "Exhibit C," and made a part hereof.

Fifth. Defendants allege that they were, by virtue of said verdict and judgment or order remanding said defendants to jail to await the judgment and sentence of the court, held in Lamar County jail until the present indictment, #230, was presented and filed against these defendants and their co-defendants M. F. Ball, after which time said case number 3 was dismissed without the knowledge or consent of these defendants, and they were then required to give bond to answer the charge in said indictment #230.

6th. Defendants show to the court that said indictment #3, aforesaid, charged these defendants and their co-defendant with unlawfully, and with malice aforethought, shooting and wounding William T. Box; that said indictment was a good and sufficient indictment, fully charging them and each of them with the offenses of assault with intent to kill; that the shooting and wounding William T. Box, charged in said indictment #3, is the same identical shooting and wounding of William T. Box as charged in indictment #230 that they are now called upon to answer, and is one and the same shooting, and one and the same time, place, and transaction. That if said William T. Box ever died from gun shot wounds as charged in said indictment #230, that he died before the said indictment #3
15 aforesaid was presented, which fact was known to the district attorney who drew the bill of indictment and to the grand jury that presented same before the same was presented; that the facts proved upon the trial of these defendants upon indictment #3 showed that Box was dead at the time they were tried on said indictment charging them with an assault with intent to kill William T. Box, by reason of which presentation of said indictment #3 and the empanneling and swearing the jury and arraigning these defendants for trial aforesaid defendants say they were put in jeopardy for the same offense which they are now called to answer; that since the death of the said William T. Box the Government, by its legally constituted grand jury and circuit court aforesaid, and without the consent of either of these defendants, carved out of the shooting and wounding of William T. Box the offense of an assault with intent to kill and tried and convicted these defendants, from which said conviction for an assault with intent to kill these defendants have never appealed; that if the court trying these defendants failed to render judgment upon the verdict of the jury finding these defendants guilty of an assault with intent to kill as charged in indictment #3 it is no fault of these defendants; that they nor either of them has ever objected to a legal judgment being rendered upon said verdict finding defendants guilty as charged in said indictment #3.

16 All the objections the defendants ever made to the judgment of the court trying them was to the judgment sentencing them to death, which said judgment was not supported by the indictment and verdict of the jury; that there is no order or judgment of this court vacating and setting aside said verdict unless the same was vacated and rendered void by the action of this court in dismissing said case #3, aforesaid.

Wherefore these defendants plead specially said facts in bar of further prosecution for the alleged shooting and wounding William T. Box, and pray that they be discharged and go hence without day.

Before the undersigned authority personally appeared J. C. Ball and R. E. Boutwell, who each, on oath, for himself says that he is the identical person named in the above and foregoing plea, and who is charged by indictment 230 with the murder of William T. Box; that the facts and allegations stated in said plea are true.

R. E. BOUTWELL.
J. C. BALL.

Subscribed and sworn to before me by each person this 18th day of April, 1893.

A. D. BROOKS,
Clerk U. S. Dist. Court E. D. T.

EXHIBIT A.

In the name and by the authority of the United States of America.

17 In the circuit court of the United States of America for the eastern district of Texas, in the fifth circuit.

At a stated term of the circuit court of the United States of America for the eastern district of Texas, in the fifth circuit, begun and held at Paris, Texas, within and for the district and circuit aforesaid, on the second Monday, the same being the fourteenth (14) day of October, in the year of our Lord eighteen hundred and eighty-nine, and continued by adjournment to and including the seventeenth day of October, in the year of our Lord eighteen hundred and eighty-nine.

Eastern district of Texas, set.: The grand jurors of the United States of America, duly elected, impanneled, tried, sworn, and charged to inquire into and due presentment make of offenses against the laws of the United States of America, in and for the district and circuit aforesaid, on their oath in said court present: That one M. F. Ball and one J. C. Ball and one R. E. Boutwell, whose names are to the grand jurors otherwise unknown, late of the county of Pickens, in the Chickasaw Nation, in the Indian Territory, in the district and circuit aforesaid, on the twenty-sixth day of June, in the year of our Lord eighteen hundred and eighty-nine, in said Pickens County, in said Chickasaw Nation, in the Indian Territory, the same being annexed to and constituting a part of the said fifth circuit, and annexed to and constituting a part of the eastern district of Texas, for judicial purposes, and being within the juris-

18 diction of this court, did unlawfully, fraudulently, and feloniously and with their malice aforethought, and with a certain deadly weapon, to wit, a certain gun, in the hands of the said M. F. Ball, J. C. Ball, and R. E. Boutwell, then and there held, make an assault in and upon the body of one William T. Box with said gun held as aforesaid, said gun being then and there loaded and charged with gunpowder and leaden balls, then and there held and used as aforesaid, the said M. F. Ball and the J. C. Ball and the said R. E. Boutwell did shoot off and discharge the contents of said gun in and upon the body of the said William T. Box, inflicting thereon ten mortal wounds, of which mortal wounds the said William T. Box did languish and languishing did die.

And so the grand jurors aforesaid upon their oaths aforesaid, do say that upon the day aforesaid, at the place aforesaid, with said deadly weapon aforesaid, in the manner aforesaid, and used as aforesaid, did unlawfully and feloniously, and with their malice aforethought, and the malice aforethought of each of them, did kill and murder the said William T. Box. The said M. F. Ball and J. C. Ball and R. E. Boutwell, and each of them being there, white men and not citizens of the Chickasaw Nation or of the Indian Territory, or any nation or tribe thereof, contrary to the form of the statutes of the United States of America in such cases made and provided, and against the peace and dignity of the United States of America.

E. M. ALEXANDER,
Foreman of the Grand Jury.
J. E. MCCOMB,
U. S. Atty., E. D. T.

19 (Endorsed:) No. 3. The United States vs. M. F. Ball, J. C. Ball, R. S. Boutwell. Murder in I. T. A true bill. E. M. Alexander, foreman of the grand jury. U. S. witnesses:

Mrs. Lucy B. Mayfield (alias Ball), Burneyville, Chickasaw Nation, I. T.
Nannie Blunt, " " " " "
Perry C. Spilter, " " " " "
Wm. Anglin, " " " " "
Robert Blunt, " " " " "
Wat. R. Cornish, " " " " "
Bird Ashburn, " " " " "
Kener Conley, " " " " "
James Williams, " " " " "
W. C. Frazier, " " " " "
Dallas Smith, " " " " "
L. T. Blount, " " " " "

(Further endorsed:) Filed Oct. 17, 1889, in open court. H. H. Kirkpatrick, clerk.

(Further endorsed:) U. S. witnesses, continued:
J. F. Horne, Burneyville, Chickasaw Nation.
E. S. Burney, " " "
J. P. Cross, " " "
Harmon Horn, " " "
George Williams, " " "
Heck Thomas, Ft. Smith, Ark.
John Cornish, Burneyville.
A. S. Kemper, "
Watson Jones, "
John Hays, "

In the circuit court of the United States for the eastern district of Texas, at Paris.

20 I, C. Dart, clerk of the circuit court of the United States, for the eastern district of Texas, in the fifth circuit, do hereby certify the foregoing to be a true and correct copy of indictment in cause

No. 3, on the criminal docket of said court, entitled the United States vs. Jno. C. Ball, M. F. Ball, and R. E. Boutwell, as the same now appears on file in my office at Paris, Texas.

To certify which, witness my hand and the seal of said court at Paris in said district, this the 2 day of May, A. D. 1894.

[SEAL.] C. DART,
Clerk, U. S. Circuit Court, E. D. T.
By H. H. KIRKPATRICK,
Deputy.

(Endorsed:) No. 230. United States vs. M. F. Ball et al. Special plea of J. C. Ball and R. E. Boutwell. Filed Apr. 23, 1894. C. Dart, clerk. By H. H. Kirkpatrick, deputy.

In the circuit court of the United States, eastern district of Texas, holding sessions at Paris, Texas, April term, A. D. 1894.

THE UNITED STATES
vs.
M. F. BALL, JOHN BALL, and Robert Boutwell. } No. 230.

Now comes the United States of America, by and through
21 Robert E. Hannay, the United States attorney in and for the eastern district of Texas, and excepts to the special plea of the defendants filed herein, and moves the court to strike out and hold the same for naught for the following reasons, to wit:

First. Because the said special plea does not set forth the bill of indictment number 3 referred to therein, and does not set forth the records or any part thereof of the proceedings before the said court based upon said bill of indictment, and does not set forth the motion in arrest of judgment and other records filed in the said cause, and does not set forth the judgment of the Supreme Court in which said indictment is held valid for assault only, and in which said cause was remanded for further proceedings in the said circuit court.

Second. Because the said special plea should be made to speak the truth concerning all the proceedings which have been had in the said circuit and the said Supreme courts in the above styled and numbered cause.

Third. Because the said defendants and none of them have been tried in the said circuit court upon a valid indictment for the murder of William T. Box. That the bill of indictment number 3, referred to in the said special plea of the defendants, and upon which the defendants were put to trial was insufficient in law, and was void, and was in form and sub-
22 stance so defective that no valid judgment could have been entered of record in any cause or proceeding based upon said bill of indictment.

Fourth. Because none of the said defendants have been in legal jeopardy by virtue of any proceeding based upon said void, defective, and insufficient indictment, and the said defendants and none of them have been legally tried for the crime of murder, as set out in the indictment filed herein and numbered 230.

Fifth. Because whatever acquittal or conviction there may have been in the said former proceeding was void and should go for naught; and further, because no penalty has been inflicted or attempted to have been inflicted upon the said defendants, or either of them, upon any judgment or order of the said circuit court based upon said void proceeding; and further, because no punishment or penalty could have been legally inflicted upon said defendants, or either of them, upon any such order or judgment.

ROBERT E. HANNAY,
U. S. Attorney, E. D. T.

(Endorsed:) No. 230. The United States of America vs. M. F. Ball, John Ball, and Robert Boutwell. Motion to strike out special plea of defendants. Filed May 1, 1894. C. Dart, clerk. By H. H. Kirkpatrick, deputy.

23 TUESDAY, *May 1st*, 1894.

Court met pursuant to adjournment. Presiding and present, Hon. D. E. Bryant, judge. Also present, R. E. Hannay, esq., U. S. atty.; Frank Lee, esq., asst. U. S. atty.; J. S. Williams, U. S. marshal, and C. Dart, clerk. By H. H. Kirkpatrick, deputy.

* * * * * * *

THE UNITED STATES
v. } 230.
M. F. BALL ET AL.

This day this cause came on to heard upon the plea of former acquittal and former jeopardy interposed herein by the defendant M. F. Ball, and the argument of counsel thereon being heard and the court being fully advised, because it is the opinion of the court that the law is against the defendant, the plea is overruled and denied; to which ruling of the court defendant in open court excepted.

THE UNITED STATES
v. } 230.
M. F. BALL ET AL.

This day came on to be heard the special plea of former jeopardy interposed herein by defendants, J. C. Ball and R. E. Boutwell, and the argument of counsel thereon being heard and the court being fully advised, because it is the opinion of the court that the law is against the defendant, the plea is overruled and denied; to which ruling of the court the
24 defendants in open court excepted.

In the circuit court of the United States, east. dist. of Texas, holding sessions at Paris, Texas.

THE UNITED STATES
vs.
M. F. BALL ET AL.

And now comes M. F. Ball, one of the defendants in the above-entitled and numbered cause, and says that the Government ought not further

prosecute this cause against this defendant, because he says that the crime charged against this defendant is not an offense against the laws of the United States, and that this court has no jurisdiction to try him for said alleged offense for the reason that the deceased, William T. Box, and this defendant were each citizens of the Chickasaw Nation and members of the tribe of Chickasaw Indians at the time this offense is alleged to have been committed, and the crime alleged in the indictment was committed, if at all, in the said Chickasaw Nation, Indian Territory.

Wherefore this defendant says that this court has no jurisdiction to try this defendant for the crime charged against him herein, and he prays that he be discharged and go hence without day.

HODGES & NICHOLS and
J. M. LONG,
Attys. for Deft.

25 THE STATE OF TEXAS,
County of Lamar:

Before me, the undersigned authority, on this day personally appeared M. F. Ball, who, being by me duly sworn, on his oath says that the facts set forth in the foregoing plea are true.

M. F. BALL.

Sworn to and subscribed before me, this 30 day of April, A. D. 1894.

H. H. KIRKPATRICK,
U. S. Commissioner.

(Endorsed:) No. 230. United States vs. M. F. Ball. Plea to the jurisdiction of the court as to defendant M. F. Ball. Hodges & Nichols and J. M. Long, attys. for deft. Filed April 30, 1894. C. Dart, clerk. By H. H. Kirkpatrick, deputy.

In the circuit court of the United States, eastern district of Texas, at Paris, Texas.

THE UNITED STATES
vs.
M. F. BALL ET AL. } No. 230.

And now comes the defendant M. F. Ball, and moves the court to grant him a separate trial herein for the following reasons, to wit:

I.

26 Because the wife of his co-defendant J. C. Ball and the wife of his co-defendant R. E. Boutwell are each material witnesses for him upon the trial of this cause. That he expects to prove by the said wives of his co-defendants that he entered into no conspiracy with their said husbands to take the life of deceased, William T. Box, and that at the time of the homicide he was not doing any act in furtherance of that design, and that he was in no way implicated in the murder of said Wm. T. Box.

Wherefore he prays that the court grant him a severance and that he tried separately from his co-defendants.

HODGES & NICHOLS and
J. M. LONG,
Attys. for Defendant.

I, M. F. Ball, on oath state that the facts set forth in the foregoing application for a severance are true.

M. F. BALL.

Sworn to and subscribed before me this 1st day of May, A. D. 1894.

H. H. KIRKPATRICK,
U. S. Commissioner.

(Endorsed:) No. 230. The United States vs. M. F. Ball et al. Motion for severance of M. F. Ball. Filed May 1, 1894. C. Dart, clerk. By H. H. Kirpatrick, deputy.

In the circuit court of the United States, eastern dist. of Texas.

THE UNITED STATES }
vs.
M. F. BALL ET AL. }

27 Now come the defendants J. C. Ball and R. E. Boutwell, and pray the court to grant them a severance in this case that they may have a separate trial from their co-defendant M. F. Ball, for the following reasons, viz:

1st. Because their said co-defendant has once been tried and acquitted of the identical offense with which he is now charged.

2nd. Because the Government relies on act' and declarations of M. F. Ball as evidence upon which a conviction will be asked, which acts and declarations were made after the death of William Box, the party alleged to have been murdered, which acts and declarations were not made to the knowledge of or in the *presents* or hearing of either of these defendants.

3rd. Because the proof that will be offered by the prosecution will show that M. F. Ball was not present at the time Box was killed, and was doing no act that would constitute him a principal in the alleged murder of William Box.

4th. Because this court has no jurisdiction to try M. F. Ball, as fully appears from his plea filed herein.

5th. Because M. F. Ball is a material witness for these defendants, and they have a right to his testimony free from the embarras'ments of a defendant on trial.

Wherefore they pray that a severance be granted and that M. F. Ball be first tried.

HODGES & NICHOLS &
J. M. LONG,
Attys. for Defts.

28 (Endorsed:) The United States vs. M. F. Ball. No. 230. Motion for severance. Filed May 1, 1894. C. Dart, clerk. By H. H. Kirkpatrick, deputy.

TUESDAY, *May 1st*, 1894.

Court met pursuant to adjournment. Presiding and present, Hon. D. E. Bryant, judge. Also present, R. E. Hannay, esq., U. S. atty.; Frank Lee, esq., asst. U. S. atty.; J. S. Williams, U. S. marshal; and C. Dart, clerk. By H. H. Kirkpatrick, deputy.

* * * * * *

THE UNITED STATES
v. } 230.
M. F. BALL ET AL.

This day came on to be heard the motion of the defendant, M. F. Ball, for a severance herein, and the same having been considered, because it is the opinion of the court that the ends of the law and justice do not so demand, the motion is overruled and a severance denied.

THE UNITED STATES
v. } 230.
M. F. BALL ET AL.

This day came on to be heard the motion of the defendants, J. C. Ball and R. E. Boutwell, for a severance herein, and the same
29 having been considered, because it is the opinion of the court that the ends of the law and justice do not so demand, the motion is overruled and a severance denied.

TUESDAY, *the 1 day of May, A. D.* 1894.

Present, the Honorable D. E. Bryant, judge, presiding. The following, among other proceedings, were had, to wit:

THE UNITED STATES
vs.
M. F. BALL, J. C. BALL, and R. E. Boutwell. } No. 230. Circuit court, criminal docket.

This cause coming on this day to be heard, came the United States, by her attorney, and announced ready for trial, and the defendants, M. F. Ball, J. C. Ball, and R. E. Boutwell, in their own proper persons and by attorneys, appeared and announced ready, and the said defendants being arraigned pleaded not guilty each for himself, and thereupon came a jury of twelve good and lawful men, to wit:

G. P. Shelton, T. J. Saufley, D. R. Blair, M. J. Glover, J. B. Hilliard, J. K. Davis, G. W. Fooshee, R. W. Emerson, T. J. Moore, W. E. Wake, R. E. Dolman, and George O. Cabiness, who, having been duly
30 tried, impaneled, and sworn as required by law, and having heard the evidence introduced up to the hour of adjournment, and the same not being concluded, the further consideration of this case was postponed until to-morrow, and the jury was committed to the custody of the marshal, after being duly cautioned and instructed by the court.

WEDNESDAY, *the 2d day of May, A. D.* 1894.

Present, the Honorable D. E. Bryant, judge, presiding. The following, among other proceedings, were had, to wit:

THE UNITED STATES
vs.
M. F. BALL, J. C. BALL, and R. E. Boutwell. } No. 230. Circuit court, criminal docket.

This cause coming on this day to be further heard, came the United States, by her attorney, and announced ready for trial, and the defendants, M. F. Ball, J. C. Ball, and R. E. Boutwell, in their own proper person and by attorneys, appeared, and thereupon came the jury of twelve good and lawful men who were on yesterday duly tried, empaneled, and sworn as required by law, and the hearing of the evidence herein was resumed and continued up to the hour of adjournment, and not being concluded the further
31 consideration of this cause was postponed until to-morrow, the jury remaining in custody of the marshal.

THURSDAY, *the 3rd day of May, A. D.* 1894.

Present, the Honorable D. E. Bryant, judge, presiding. The following, among other proceedings, were had, to wit:

THE UNITED STATES
vs.
M. F. BALL, J. C. BALL, and R. E. Boutwell. } No. 230. Circuit court, criminal docket.

This cause coming on this day to be further heard, came the United States, by her attorney, and announced ready for trial, and the defendants, M. F. Ball, J. C. Ball, and R. E. Boutwell, in their own proper person, and by attorneys, appeared and announced ready, and thereupon came the jury of twelve good and lawful men, heretofore tried, empanneled, and sworn to try this cause, and the hearing of the evidence was resumed and closed, and the argument of counsel was begun and continued to the hour of adjournment, and not being concluded the further consideration of this case was postponed until to-morrow, the jury remaining in custody of the marshal.

32 FRIDAY, *the 4th day of May, A. D.* 1894.

Present, the Honorable D. E. Bryant, judge, presiding. The following, among other proceedings, were had, to wit:

THE UNITED STATES
vs.
M. F. BALL, J. C. BALL, and R. E. Boutwell. } No. 230. Circuit court, criminal docket.

This cause coming on this day to be further heard, came the United States, by her attorney, and announced ready for trial, and the defendants, M. F. Ball, J. C. Ball, and R. E. Boutwell, in their own proper

persons and by attorneys, appeared, and thereupon came the jury of twelve good and lawful men, heretofore tried, empanneled, and sworn to try this cause, and the argument of counsel was concluded and the charge of the court was delivered to the jury, and thereupon the jury retired to consider of their verdict, and no verdict having been returnd at the hour of adjournment, the further consideration of this cause was postponed until to-morrow and the jury was retained in custody of the marshal.

33 SATURDAY, *the 5th day of May, A. D.* 1894.

Present, the Honorable D. E. Bryant, judge, presiding. The following, among other proceedings, were had, to wit:

THE UNITED STATES *vs.* M. F. BALL, J. C. BALL, and R. E. Boutwell. } No. 230. Circuit Court, criminal docket.

This cause coming on this day to be further heard, came the United States, by her attorney, and the defendants, M. F. Ball, J. C. Ball, and R. E. Boutwell, in their own proper persons and by attorneys, appeared, and thereupon came a jury of twelve good and lawful men, to wit:

G. P. Shelton, T. J. Saufley, D. R. Blair, M. J. Glover, J. B. Hilliard, J. K. Davis, G. W. Fooshee, R. W. Emerson, T. J. Moore, W. E. Wake, R. E. Dolman, and George O. Cabiness; who, having been heretofore duly tried, impaneled, and sworn as required by law, and having heard the evidence and the argument of counsel and received the charge of the court retired to consider of their verdict, on this day brought into open court their verdict, in words and figures as follows, to wit:

We, the jury, find against the special plea of the defendant, M. F. Ball, as to the jurisdiction of the court, and we further find against the
34 special plea of defendants, M. F. Ball, J. C. Ball, and R. E. Boutwell, as to former trial. And we, the jury, find the defendants, M. F. Ball, J. C. Ball, and R. E. Boutwell, guilty of murder in the Indian country, as charged in this indictment.

May 5, '94.

D. R. BLAIR, *Foreman.*

It is, therefore, considered by the court that the defendants, M. F. Ball, J. C. Ball, and R. E. Boutwell, each and all of them, are guilty of murder as charged in the indictment and as found by the jury, and it is ordered that they be remanded to the custody of the marshal to await the judgment and sentence of the court.

In the circuit court of the United States, eastern district of Texas, holding session at Paris, Texas.

THE UNITED STATES *vs.* M. F. BALL ET AL. } No. 230.

Now comes the defendants, M. F. Ball, J. C. Ball, and R. E. Boutwell, and leave of the court first had and obtained, files this their amended

motion in arrest of judgment in lieu of their motion filed herein on the 17th day of May, A. D. 1894, and each move the court to arrest the judgment heretofore entered against them, adjudging them guilty of murder,

35 because the indictment in this case upon which these defendants were tried and convicted is insufficient in law and fatally defective in the following particulars, viz:

I.

Said indictment fails to allege that Wm. T. Box died of the mortal wounds inflicted by these defendants in and upon his body.

II.

Said indictment fails to give a description of the mortal wounds inflicted in and upon the body of Wm. T. Box by these defendants, and fails to allege upon what portion of his body said mortal wound was inflicted.

III.

Said indictment fails to allege that the offense with which these defendants stand charged was committed at a place within the sole and exclusive jurisdiction of this court.

IV.

Because there is no allegation in the indictment showing that this court has jurisdiction to try these defendants for the offense alleged in that it does not aver that the deceased, Wm. T. Box, and each of these defendants were not members of any tribe of Indians in the Indian Territory by marriage or adoption.

V.

Because there is no allegation in the indictment that Wm. T. Box died within the jurisdiction of the eastern district of Texas.

36 Wherefore these defendants pray that the judgment heretofore entered against them be arrested, set aside, and held for nought, and that the indictment herein be quashed.

HODGES & NICHOLS &
J. M. LONG,
Attorneys for Defendants, M. F. Ball, J. C. Ball, and R. E. Boutwell.

(Endorsed:) No. 230. The United States vs. M. F. Ball et al. Amended motion in arrest of judgment. Filed June 6, 1894. C. Dart, clerk. By H. H. Kirkpatrick, deputy.

FRIDAY, *June 15th*, 1894.

Court met pursuant to adjournment. Present and presiding, Hon. D. E. Bryant, judge. Also present, R. E. Hannay, esq., U. S. attorney; Frank Lee, esq., asst. U. S. attorney; J. S. Williams, U. S. marshal, and C. Dart, clerk. By H. H. Kirkpatrick, deputy.

THE UNITED STATES }
v. } 230.
M. F. BALL ET AL. }

This day came on to be heard the defendants' motions in arrest of judgment herein, and the argument of counsel having been heard, because it is the opinion of the court that the law is against the defendants the
37 motion is overruled; to which ruling of the court the defendants then and there in open court excepted.

In the United States court, eastern district of Texas, holding session at Paris, Texas.

THE UNITED STATES }
vs. } No. 230.
M. F. BALL ET AL. }

Now comes the defendant M. F. Ball, and, leave of the court first had and obtained, files this his amended motion for a new trial in lieu of his original motion filed herein on the 7th day of May, 1894, and move' the court to set aside the verdict of the jury and grant him a new trial herein for the following reasons, to wit:

I.

Because the court erred in sustaining the motion made by the district attorney to strike out the special plea of former acquittal, filed herein by this defendant on the 25 day of April, A. D. 1894.

II.

Because the court erred in failing to pass upon this defendant's plea to the jurisdiction of this court before requiring this defendant to announce ready for trial upon the merits of this case, and in declining to give
38 this defendant a separate trial upon said plea and in submitting the same to the jury, together with the other issues in the case.

III.

Because the court erred in refusing to grant the severance asked by this defendant in his written motion filed herein before he announced ready for trial.

IV.

Because the court erred in sustaining the objection of the district attorney and in preventing this defendant from prooving by the Government witness, Joe Cross, how much money he and Ed. Berney paid, or had promised to pay, Mr. Ownby for his services in assisting the district attorney in the prosecution of this case.

V.

Because the court erred in allowing the Government witness Maggie Freeman to testify, over defendant's objection, that she heard the defend-

ant J. C. Ball say, after he was arrested and while he was in the custody of the marshal, in a conversation with this defendant and his co-defendant R. E. Boutwell, "If it had not been for his old boots they would never have suspected him of killing deceased," because the proper predicate had not been laid by the Government authorising the admission of said testimony.

VI.

Because the court erred in permitting the Government to prove
39 by its witness Ed. Berney, over defendant's objection, that he and Joe Cross had not employed private counsel to assist in the prosecution of this case on account of any ill feeling towards the defendants, but because the deceased, Wm. T. Box, was a warm friend of his and a next-door neighbor, because the same was irrelavant and immaterial and tended to prove no issue in the case.

VII.

Because the court erred in admitting in evidence over defendant's objection a certified copy of the marriage license of S. C. Mayfield to Miss L. O. Box, because this defendant had no notice that the Government would introduce said marriage license in evidence and because the same was an attempt on the part of the Government to prove the contents of a written instrument by substitutionary evidence without any attempt to account for the loss of the original.

VIII.

Because the court erred in permitting Mrs. L. O. Ball, alias Mayfield, alias Mrs. D. O. Angling, to testify over this defendant's objection, and after this defendant had introduced in evidence a marriage license showing said witness to be the wife of this defendant, and after said witness had testified that she had never been divorced from this defendant, that "She thought she was legally married to this defendant, but had learned since
40 that she was not, and that at the time she married this defendant her husband, C. S. Mayfield, was living, and that he had not been divorced from her." Because said witness was not competent by reason of her marital relations to testify against this defendant or either of his co-defendants.

IX.

Because of the misconduct of Robert E. Hannay, the United States district attorney, who conducted the prosecution against this defendant, by asking the witness Charles Horn, a material witness for this defendant, when upon the stand as a witness and in the presence and hearing of the jury who tried this defendant, "Have you ever been in the penitentiary? How much money did you get for coming down here as a witness? How much money have you been promised for testifying in this case?" Because said question so propounded to said witness was an intimation by the Government's officer to the jury that said witness had been in the pen-

itentiary and that said witness had been paid by these defendants, or their friends, or had been promised pay to come to this court and testify for them and thereby greatly impairing the testimony of said witness before the jury.

X.

Because the court erred in refusing to order the shotgun that was introduced in evidence and which was the property of his co-defendant J. C. Ball, and which had been in the exclusive possession of the officers
41 of this court since these defendants were first arrested in 1889, to be delivered to these defendants or some other competent person for the purpose of testing said gun as to the manner in which it would shoot "low-mould buckshot," as requested by these defendants in open court, as the fact as to how said gun would shoot low-mould buckshot was a material inquiry in this case, and a thorough test of said gun would have accurately settled the disputed question as to whether said gun, as contended by the Government, fired the shot that killed deceased or whether it did not fire said shot, as contended by the defendants in this case.

XI.

Because the court erred in his charge to the jury, wherein he instructed them to find the plea of former acquittal, filed herein by this defendant and submitted to the jury together with his other plea of not guilty, untrue, because said plea was substantially proved to be true by the testimony introduced by this defendant before the court and jury without any objection from the counsel for the Government.

XII.

Because the court erred in refusing and failing to give to the jury, as the law applicable to this case, the special instructions numbered 1, 2, 3, asked by this defendant, because they each contained correct propositions of law and the evidence in the case fairly raised the issues therein submitted and called for the same.

42 XIII.

Because the court erred in his charge to the jury in submitting the question of jurisdiction over the person of this defendant to the jury, and in not charging them to find that this court was without jurisdiction to try this defendant for the alleged killing of Wm. T. Box, because the evidence in this case conclusively shows that at the time of the alleged homicide that this defendant and the said Wm. T. Box were each members of the Chickasaw tribe of Indians in the Indian Territory by marriage and adoption.

XIV.

Because the court erred in his charge to the jury, in that he failed to charge all of the law applicable to the facts proved, and failed to submit to the jury all of the issues raised by the testimony in the case.

XV.

Because the court erred in his charge to the jury wherein he told them that if this defendant's wife prior to the time she married defendant was married to Cebe S. Mayfield, and that if they believed from the testimony that at the time she so married this defendant said Mayfield was living and that she had not been divorced from him, that then defendant's marriage with her would be void and that this court would have jurisdiction to try this defendant for the killing of Wm. T. Box, because the testimony in this case shows that if this defendant's wife ever did
43 marry Mayfield, that she married him in the State of Texas for the purpose of avoiding the laws of the Chickasaw Nation, where they each lived at that time, and was therefore void and constituted no legal impediment to her marriage with this defendant.

XVI.

Because the verdict of the jury is contrary to the law as given in charge by the court and is contrary to the evidence adduced and is without evidence to support it in this: The evidence fails to show that this defendant had anything whatever to do with the killing of Wm. T. Box.

XVII.

Because the verdict of the jury finding this defendant guilty of the murder of Wm. T. Box is contrary to the law as given in charge by the court, is contrary to the evidence adduced and is without evidence to support it in this: The testimony conclusively shows that if this defendant is guilty of any offense he is only guilty as an accessory and not as a prin*cip*le *a*ffender in the killing of Wm. T. Box.

XVIII.

Because all of the evidence taken to be absolutely true does not establish the guilt of this defendant beyond a reasonable doubt and to a moral certainty.

XIX.

Becaus: the special verdict of the jury finding against this defendant's plea to the jurisdiction of this court is contrary to the evidence
44 adduced in this: The evidence shows conclusively that the deceased, Wm. T. Box, and this defendant were each members of the tribe of Chickasaw Indians in the Indian Territory by marriage and adoption and that this court has no jurisdiction to try this defendant.

XX.

Because the verdict of the jury is contrary to and is without evidence to support it in this: The testimony fails to show that the deceased, Wm. T. Box, was killed within the jurisdiction of this court or that he died from the infliction of the wounds claimed to have been inflicted by these defts. within the jurisdiction of this court.

XXI.

Because the court erred in permitting the jury in this case, after the same had been submitted to them, to come into court during the absence of this defendant, and during the absence of each of his co-defendants J. C. Ball and R. E. Boutwell, and demanded from the court the reproduction from the stenographers notes, the testimony of the witnesses H. H. Kirkpatrick and Tony Hertz, and in telling the jury, in the absence of the defendants herein, "I will have the stenographer to extend the testimony from her notes and will let you know when I get it ready." And the court erred in having said testimony extended from the stenographer's notes and in delivering the same to them without the knowledge or consent of either of these defendants or their attorneys, because the type-written
45 copy of the testimony of said witnesses so delivered to the jury by the court was not verified by the oath of said stenographer, and the same was an attempt on the part of the Government to get other and further testimony before said jury after this case had been submitted to them for their determination and from a source and in a manner not authorized by law and in violation of the Constitution of the United States, guaranteeing that in criminal prosecutions the accused shall be confronted with the witnesses against him. That said type-written testimony was extended and given to said jury without the knowledge or consent of either of the defendants herein, they attach hereto their affidavits and the affidavits of their attorneys, which are marked respectively Exhibits "A" & "B," and asked to be taken as part of this motion.

XXII.

Because the jury in this case was not in the custody of a duly sworn bauliff, sworn as the law directs, or any other officer of this court, from the time said jury was empanneled until they returned a verdict of guilty against this defendant, but was in the sole and exclusive control of Drumgould Williams, who was not an officer of this court at that time, and who was not sworn as a special bailiff for said jury, all of which defendants can and will prove upon the hearing of this motion.

XXIII.

Because the jury in this case was permitted to seperate each night
46 from the time they were empanneled as jurors in this case until they returned a verdict of guilty against this defendant; that the members of said jury, during the entire trial of this cause and after this case was submitted to them, occupied 5 different rooms at the Lamar Hotel at nights and slept therein seperate and apart from their fellow-jurors; that in addition to occupying the 5 different rooms as aforesaid on the last two nights and while said jury was deliberating upon this case, the foreman of said jury, D. R. Blair, occupied a cot in an open hallway leading to one of the main thoroughfares in the city of Paris; that during the time they so occupied said apartments at said hotel they had with them no officer of this court as bailiff; that while they were considering upon this case they were permitted to seperate upon the streets of Paris and engage in conversation with many people in the absence of a bailiff or

other members of said jury; that members of said jury conversed with any and every person they pleased while deliberating upon this case, and heard many remarks prejudicial to these defendants, all of which this defendant can and will prove upon the hearing of this motion.

XXIV.

Because of the misconduct of the jury who tried this defendant in many particulars and more especially because said jury, while deliberating upon this case, received from one of the Government officers other
47 than the one who had them in charge intoxicating liquors at the expense of said Government official, all of which this defendant can and will prove upon the hearing of this motion.

XXV.

Because since the trial of this cause this defendant has discovered new testimony material to his defense herein, in this, he has learned that C. S. Mayfield, usually called Cebe Mayfield, who the Government claimed upon the trial of this cause to be the legal husband of L. O. Ball, this defendant's wife, was not the husband of his said wife and was never legally married to her, but at the time he so claims to have married Miss L. O. Box, he, the said S. C. Mayfield, had a living wife and was not divorced from her, and that his pretended marriage with this defendant's wife, formerly L. O. Box, was bigamous and void; that the said C. S. Mayfield married Louisa Rogers in Cooke County, Texas, on the 16 day of Jan., 1871, as will appear by certified copy of his marriage certificate hereto attached, marked Exhibit "C," and made a part hereof; that she, the said Louisa Rogers, was living at the time he married L. O. Box, and he, the said Cebe Mayfield, had not, prior to that time, obtained a divorce from her, all of which appears from the affidavit of J. L. Keller hereto attached, marked Exhibit "D," and made a part hereof.

That none of these facts were known to defendant prior to the trial of this cause, but have all been learned since this case was tried; that
48 this defendant did not know, prior to the trial of this case, that the Government would contend that he was not the legal and lawful husband of L. O. Ball, formerly L. O. Box, and now going by the name of L. O. Angling, and therefore made no inquiry as to her former marriage with Mayfield, but had been informed and always understood that his wife never married said Mayfield prior to her marriage with him, but understood, and was informed, that she simply lived with said Mayfield in adultery for a short time.

That this defendant can and will prove, upon another trial of this cause, that said C. S. Mayfield never was the lawful husband of L. O. Box; that he was never lawfully married to her prior to the time she married this defendant; that at the time the Government claims Mayfield married this defendant's wife, that he, the said Mayfield, had a lawful wife then living and was not divorced from her, and that said pretended marriage was null and void, and that the said L. O. Box was lawfully and legally married to this defendant, and was his lawful wife at the time this homicide was committed, and that said facts, which he can prove by said newly discovered evidence, are in fact true.

Wherefore, for the many errors prejudicial to the rights of this defendant as above set out, he prays the court to set aside the verdict of the jury and grant him a new trial herein.

HODGES & NICHOLS &
J. M. LONG,
Attorneys for Deft. M. F. Ball.

49 STATE OF TEXAS,
County of Lamar:

I, M. F. Ball, on oath state that the facts set forth in the 25 ground' of my motion for a new trial are true to the best of my knowledge and belief, so help me God.

M. F. BALL.

Sworn to and subscribed before me this 6 day of June, A. D. 1894.
[SEAL.] E. P. SCOTT,
Notary Public, Lamar County, Texas.

EXHIBIT A.

STATE OF TEXAS,
County of Lamar:

Be it remembered that on this 6 day of June, A. D. 1894, personally appeared before me, the undersigned authority, M. F. Ball, J. C. Ball, and R. E. Boutwell, and who, being by me duly sworn, on their oaths say that they are defendants in the case of the United States against M. F. Ball et al., pending in the circuit court of the United States in and for the eastern district of Texas, and numbered 230 on the docket of said court; that they were not present in court when the jury in their case came into court and demanded the reproduction from the stenographer's notes the testimony of the witnesses H. H. Kirkpatrick and Tony Hertz; that they did
50 not know until after the verdict of guilty was returned against them that the jury who tried them ever made such request; that they did not know that said testimony was being extended for the purpose of being handed to the jury, and never learned that the same had been given them until after the verdict of guilty was returned against them; that they never gave their consent for said reproduction to be made or given to the jury, and the same was done without their knowledge or consent.

M. F. BALL.
J. C. BALL.
R. E. BOUTWELL.

Sworn to and subscribed before me this 6 day of June, A. D. 1894.
[SEAL.] E. P. SCOTT,
Notary Public, Lamar County, Texas.

EXHIBIT B.

STATE OF TEXAS,
County of Lamar:

Be it remembered that on this 15th day of June, A. D. 1894, personally appeared before the undersigned authority J. C. Hodges, A. J. Nichols, and J. M. Long, who, being by me duly sworn, on their oaths say that they were the attorneys for the defendants M. F. Ball, J. C. Ball, and R.

E. Boutwell upon the trial of cause No. 230 on the docket of the circuit court of the United States in and for the eastern district of Texas, wherein they were tried and convicted of the murder of Wm. T. Box; that we were the only attorneys representing the defendants upon the trial
51 of said cause; that we did not know that the testimony of H. H. Kirkpatrick and Tony Hertz, reproduced by the stenographer from her notes, had been given to the jury until after they came in and reported to the court that they had agreed upon a verdict; that said testimony so reproduced was given to the jury in said cause after said case was submitted to them without the knowledge of either of us.

A. J. NICHOLS.
J. C. HODGES.
J. M. LONG.

Sworn to and subscribed before me this 15 day of June, A. D. 1894, by A. J. Nichols and J. M. Long.

H. H. KIRKPATRICK,
U. S. Commissioner.

EX'IBIT "C."

S. C. Mayfield to Louisa Rogers, ss.

Be it remembered that on this 16 day of Jan'y, 1871, the following marriage license was issued, to wit:

TEXAS, *to wit: Cooke County, ss:*

To all who shall see these presents, greeting: Know ye, that any person legally authorized to celebrate the rites of matrimony is hereby licensed to join in marriage as husband and wife S. C. Mayfield and Louisa Rogers, and for so doing this shall be his sufficient authority.

In testimony whereof I, F. L. Cleaves, clerk of the Cook,
52 County court, hereunto subscribe my name and affix the seal of said court this 16 day of Jan'y, 1871.

F. L. CLEAVES.

Be it further remembered that on this day of 18 , the following certificate was filed in my office, to wit:

TEXAS, *to wit: Cook' County:*

This certifies that I joined in marriage as husband and wife S. C. Mayfield and Louisa Rogers on the 25th day of Jan'y, 1871.

JOHN TYLER, *M. G.*

STATE OF TEXAS,
Cooke County:

I, E. C. Peery, clerk of Cooke County, Texas, do hereby certify that the above and foregoing is a true and correct copy of the record as appears of record in Vol. 1, page 336, of the marriage records of Cooke County, Texas.

Witness my hand and seal of office this 28th day of May, A. D. 1894.

[SEAL.]

E. C. PEERY,
County Clerk.
By WM. H. DAWUARD,
Deputy.

EX'IBIT D.

UNITED STATES OF AMERICA,
Indian Territory:

Before the undersigned authority on this day personally appeared
53 J. L. Keller, known to me to be reputable and entitled to credit, and who, after being by me duly sworn, on his oath says that he is acquainted with Cebe Mayfield, who married Wm. T. Box's daughter; that the said Cebe Mayfield had a living wife at the time he married Miss Box; that prior to that time he married Louisa Rogers; that his first marriage took place about the year 1872, in Cooke Co., Texas.

If said Cebe Mayfield ever obtained a divorce from his first wife I never heard of it, but am satisfied that he never obtained such divorce. I don't know the whereabouts of Cebe Mayfield's former wife, but have heard that she lives near San Antonia, Texas.

J. L. KELLER.

Sworn to and subscribed before me this 29 day of May, 1894.
[SEAL.] W. A. BREMER,
Notary Public.

(Endorsed:) No. 230. The United States vs. M. F. Ball et al. Amended motion for a new trial of deft. M. F. Ball. Filed June 6, 1894. C. Dart, clerk. By H. H. Kirkpatrick, deputy.

54 In the United States court, eastern district of Texas, holding sessions at Paris, Texas.

THE UNITED STATES }
vs. } No. 230.
M. F. BALL ET AL. }

Now comes the defendants J. C. Ball and R. E. Boutwell and leave of the court first had and obtained, files herein their amended motion for a new trial in lieu of their original motion filed herein on the 7 day of May, A. D. 1894, and moves the court to set aside the verdict of the jury and grant them a new trial herein for the following reasons, to wit:

I.

Because the court erred in sustaining the motion made by the district attorney to strike out the special plea of former jeopardy and former conviction filed herein by these defendants on the 23d day of April, A. D. 1894.

II.

Because of the errors set out in the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 14th, 16th, 18th, 20th, 21st, 22nd, 23d, 24th ground for a new trial in the motion of their co-defendant M. F. Ball filed herein on the 6th day of June, A. D. 1894, which is here referred to and made a part hereof and adopted as the motion of these two defendants.

III.

Because the court erred in refusing and failing to give to the
55 jury as the law applicable to this case the special instruction numbered 4, asked by these defendants because the same contained a correct proposition of law and the evidence in the case fairly raised the issue therein submitted and called for the same.

IV.

Because the court erred in forcing these defendants to be put upon trial over their objections with their co-defendant M. F. Ball over whose person this court had no jurisdiction, and who had been tried and acquitted in this court for the identical transaction with which these defendants are now convicted, and in admitting in evidence against these defendants the actions and declarations of him, the said M. F. Ball.

V.

Because the court erred in failing to instruct the jury in his charge that the acts and declarations of their co-defendant M. F. Ball would only be considered by them in determining the guilt of the said M. F. Ball, and was not evidence of the guilt of these defendants.

Wherefore, for the many errors set out above, prejudicial to the rights of these defendants, they pray the court to set aside the verdict of the jury and grant them a new trial herein.

HODGES & NICHOLS &
J. M. LONG,
Attorneys for the Defendants J. C. Ball and R. E. Boutwell.

56 (Endorsed:) No. 230. The United States vs. M. F. Ball et al. Amended motion for new trial of defts. J. C. Ball and R. E. Boutwell. Filed June 6, 1894. C. Dart, clerk. By H. H. Kirkpatrick, deputy.

MONDAY, *July 9th*, 1894.

Court met pursuant to adjournment. Present and presiding, Hon. D. E. Bryant, judge. Also present R. E. Hannay, esq., U. S. attorney; J. S. Williams, U. S. marshal, and C. Dart, clerk. By H. H. Kirkpatrick, deputy.

* * * * * * *

THE UNITED STATES)
v.) 230.
M. F. BALL ET AL.)

This day this cause came on to be heard upon the motions of the defendants for a new trial herein and the hearing not being concluded at the hour of adjournment the further consideration thereof was postponed until tomorrow.

TUESDAY, *July 10th*, 1894.

57 Court met pursuant to adjournment. Present and presiding, Hon. D. E. Bryant, judge. Also present R. E. Hannay, esq., U. S. attorney; J. S. Williams, U. S. marshal, and C. Dart, clerk. By H. H. Kirkpatrick, deputy.

* * * * * * *

THE UNITED STATES }
v. } 230.
M. F. BALL ET AL. }

This day this cause came on to be heard upon the motions of the defendants for a new trial herein, and the evidence in support thereof and in rebuttal and the argument of counsel having been heard and duly considered by the court, because it is the opinion of the court that the law and the facts are against the defendants, the motions are in all thing overruled and a new trial herein is denied to each and all of the defendants, to which ruling of the court the defendants each and all of them then and there in open court excepted.

SATURDAY, *July* 14, 1894.

Court met pursuant to adjournment. Present and presiding, Hon. D. E. Bryant, judge. Also present Hon. R. E. Hannay, U. S. attorney; J. S. Williams, U. S. marshal, and C. Dart, clerk. By H. H. Kirkpatrick, deputy.

58 THE UNITED STATES }
v. } 230.
M. F. BALL. }

On motion of R. E. Hannay, esq., attorney of the United States for the eastern district of Texas, the above named defendant M. F. Ball was this day brought to the bar of the court in custody of the marshal, and, being asked by the court, in open court, if he had anything to say why the judgment and sentence of the court should not be pronounced upon him in accordance with the verdict of guilty returned by the jury in this cause on the 5th day of May, A. D. 1894, and the law in such cases made and provided; and no good cause being shown why the judgment and sentence of the court should not be pronounced herein, it is therefore considered by the court that the defendant M. F. Ball is guilty of murder, as charged in the indictment and as found by the jury, and it is therefore ordered, adjudged, and decreed by the court that the defendant M. F. Ball for his crime of murder of which he stands condemned herein, be now remanded to the custody of the marshal of the United States for the eastern district of Texas, and be by him committed to the jail of Lamar County, Texas, and there kept secerely confined until Friday, the 28th day of September, A. D. 1894, when, between the hours of 10 o'clock a. m. and 4 o'clock p. m. of said day, he, the said M. F. Ball, shall be taken therefrom to the yard of the said jail, and then and there be, by the marshal aforesaid, hanged by the neck until he, the said M. F. Ball, is dead.

59 And the clerk of this court is ordered to issue a death warrant directed to the marshal aforesaid, commanding the due execution of this judgment and sentence according to law.

To which judgment of the court the defendant then and there in open court excepted.

THE UNITED STATES }
v. } 230.
JOHN BALL. }

On motion of R. E. Hannay, esq., attorney of the United States for the eastern district of Texas, the above-named defendant John Ball was this day brought to the bar of the court in custody of the marshal, and being asked by the court, in open court, if he had anything to say why the judgment and sentence of the court should not be pronounced upon him in accordance with the verdict of guilty returned by the jury in this cause on the 5th day of May, A. D. 1894, and the law in such cases made and provided; and defendant replying that he had nothing further to say, and no good cause being shown why the judgment and sentence of the court should not be pronounced herein, it is therefore considered by the court that the defendant John Ball is guilty of murder as charged in the indictment and as found by the jury; and it is therefore ordered, adjudged,
and decreed by the court that the defendant John Ball, for his
60 crime of murder, of which he stands condemned herein, be now remanded to the custody of the marshal of the United States for the eastern district of Texas, and be by him committed to the jail of Lamar County, Texas, and there kept securely confined until Friday the 28th day of September, A. D. 1894, when, between the hours of 10 o'clock a. m. and 4 o'clock p. m. of said day, he, the said John Ball, shall be taken therefrom to the yard of the said jail, and then and there be, by the marshal aforesaid, hanged by the neck until he, the said John Ball, is dead.

And the clerk of this court is ordered to issue a death warrant directed to the marshal aforesaid commanding the due execution of this judgment and sentence according to law.

To which judgment of the court the defendant then and there in open court excepted.

THE UNITED STATES }
v. } 230.
R. E. BOUTWELL. }

On motion of R. E. Hannay, esq., attorney of the United States for the eastern district of Texas, the above-named defendant R. E. Boutwell was this day brought to the bar of the court in custody of the marshal, and being asked by the court, in open court, if he had anything to say why the judgment and sentence of the court should not be pronounced upon
him in accordance with the verdict of guilty returned by the jury
61 in this cause on the 5th day of May, A. D. 1894, and the law in such cases made and provided; and the defendant answering that he had nothing to say, and no good cause being shown why the judgment and sentence of the court should not be pronounced herein, it is therefore considered by the court that the defendant R. E. Boutwell is guilty of murder as charged in the indictment and as found by the jury; and it is therefore ordered, adjudged, and decreed by the court that the defendant R. E. Boutwell, for his crime of murder, of which he stands condemned herein, be now remanded to the custody of the marshal of the United States for the eastern district of Texas, and be by him committed to the jail of Lamar County, Texas, and there kept securely confined until

Friday the 28th day of September, A. D. 1894, when, between the hours of 10 o'clock a. m. and 4 o'clock p. m. of said day, he, the said R. E. Boutwell, shall be taken therefrom to the yard of the said jail, and then and there be, by the marshal aforesaid, hanged by the neck until he, the said R. E. Boutwell, is dead.

And the clerk of this court is ordered to issue a death warrant directed to the marshal aforesaid commanding the due execution of this judgment and sentence according to law.

To which judgment of the court the defendant then and there in open court excepted.

62 In the circuit court of the United States, eastern district of Texas, holding session at Paris, Texas.

UNITED STATES
vs.
M. F. BALL ET AL. } No. 230.

Bill of exceptions.

Be it remembered that on the 23d day of April, A. D. 1894, and before this cause was called to trial, the defendant M. F. Ball filed herein his special plea of former acquittal and former jeopardy, duly verified by his affidavit, which said special plea is in words and figures as follows, viz: (See pages 6 to 12.)

Be it further remembered that on the day and date aforesaid, to wit, the 23d day of April, A. D. 1894, the defendants J. C. Ball and R. E. Boutwell filed herein their special plea of former jeopardy and former conviction duly verified by their affidavit, which said special plea is in words and figures as follows, to wit: (See pages 12 to 20.)

Be it further remembered that on the first day of May, A. D. 1894, Robert E. Hanna, the district attorney of the eastern district of Texas, filed herein his motion to strike out each of said special pleas, which said motion is in words and figures as follows, to wit: (See pages 20 to 22.)

And thereafter, to wit, on the day of May, A. D. 1894,
63 said motion to strike out said special pleas of the said defendants coming on to be heard, the same was sustained by the court, and each of said special pleas were by the court stricken out, to which action and ruling of the court the defendants M. F. Ball, J. C. Ball, and R. E. Boutwell each at the time excepted.

Be it further remembered that on the 30th day of April, A. D. 1894, and before this case was called for trial, the defendant M. F. Ball filed herein his special plea to the jurisdiction of this court, which said special plea is in words and figures as follows, to wit: (See pages 24 to 25.)

And thereupon on, to wit, the day of May, A. D. 1894, and when this case was called for trial, and after the district attorney had announced ready for trial, the defendant M. F. Ball and each of his co-defendants J. C. Ball and R. E. Boutwell demanded that before they or either of them be required to announce ready for trial upon the merits of this case that the said special plea of M. F. Ball to the jurisdiction of the court be first tried, either by the court or a jury selected for that purpose, but the court refused said demands and remarked that he would sub-

mit said special plea to the jury together with the other issues in the case. To which judgment and ruling of the court each of the defendants at the time excepted.

64 Be it further remembered that on the 1st day of May, A. D. 1894, and before this case was called for trial, the defendant M. F. Ball filed herein a motion for a severance, praying that he be tried seperately from his co-defendants J. C. Ball and R. E. Boutwell, which said motion was duly verified by his affidavit, and which is in words and figures as follows, to wit: (See pages 25 to 26.)

Which said motion was by the court overruled and said defendant denied the right of being tried seperate from his co-defendants, to which action and ruling of the court the defendant M. F. Ball at the time excepted.

Be it further remembered that on the 1st day of May, A. D. 1894, and before this case was called for trial, the defendants J. C. Ball and R. E. Boutwell filed herein their motion, duly verified by their affidavit, asking that they be tried seperately from their co-defendant M. F. Ball, which said motion is in words and figures as follows, to wit: (See pages 26 to 28.)

Which said motion, coming on to be heard, was by the court overruled and the said defendants denied the right of being tried seperate from their co-defendant, M. F. Ball, and all of said defendants were placed upon trial together, to which action, judgment, and ruling of the court the defendants J. C. Ball and R. E. Boutwell each at the time excepted.

65 And both parties having announced ready for trial the defendant M. F. Ball pleaded not guilty to the indictment herein, and in addition to his said plea of not guilty the said M. F. Ball interposed his special plea of former jeopardy and former acquittal, which said special plea is in words and figures as follows, viz: (See pages 6 to 12 of this record).

And in addition to his said plea of not guilty and his said plea of former jeopardy and former acquittal the said M. F. Ball interposed before the jury his special to the jurisdiction of this court, which said special to the jurisdiction of the court is in words and figures as follows, to wit: (See pages 24 to 25 of this record.)

And the said defendants J. C. Ball and R. E. Boutwell in addition to their plea of not guilty to the indictment herein interposed before the court and jury their special plea of former jeopardy and former conviction, which said special plea of former jeopardy and former conviction is in words and figures as follows, to wit: (See pages 12 to 20 of this record.)

Be it further remembered that on the trial of this cause the Government produced the following testimony to sustain the issue upon its part, to wit:

66 JOE CROSS.

Where did you live in 1889?

A. I lived one mile north of Berneyville, Chickasaw Nation.

Q. Are you acquainted with these defendants?

A. Yes, sir.

Q. Please point them out and tell who they are.

A. That gentleman is Filmore Ball, R. E. Boutwell, and John Ball.

Q. They are all white men, non-citizens of the I. T.? Did you know Wm. T. Box?

A. Yes, sir.

Q. Is he dead or alive?

A. He is dead.

Q. When did he die?

A. If I mistake not, about the 26th night of June, 1889, I think.

Q. In what county?

A. Pickens County, Chickasaw Nation, I. T.

Q. What caused his death?

A. He was killed, so I suppose.

Q. State if you saw any wounds on him and where were they.

A. On the morning of the 26th a man came riding up to my house in a desperate hurry. I says, What is the matter? He said old man Box was killed last night. I saddled my horse, and Ed. Berney and I rode over there. When we got there the gentlemen there had brought
67 the old man up and laid him down on the south side of his house.

Q. Who notified you?

A. Warren Puett.

Q. You know who notified him; did you see Bob Blunt?

A. Not until I went to old man Box's. We understood from this young fellow that he was killed in the road. Bob come out at the old man's and told us he was up there, and we went there.

Q. Bob Blunt told you where he was?

A. Yes, sir.

Q. Where was the wound?

A. He was shot in the breast, right across here.

Q. What was he shot with?

A. Buckshot.

Q. How many shots struck him?

A. 8 shots struck him just about here, and three more shots just glazed the collar bone on the side of the neck.

Q. What size shots did they have?

A. They were what I call the low mould buckshot.

Q. How many bullet holes did you find in him?

A. 8 in his breast, one on each side made 10, and 2 struck him down here made 12.

Q. About what aged man was Box?

A. I suppose 60 or 61 years old; I don't know his age; he looked to be older than he really was.

Q. Was he dead when you first got to him?

A. Yes, sir; dead and stiff.

Q. How long did he look to have been dead?

68 A. I could not tell anything about that; he was perfectly stiff

Q. He was lying there stiff showed to have been dead a good while; what time of day did you get to him?

A. Between 8 and 9 o'clock in the morning.

Q. I understood you to say that was on the gallery of W. T. Box house, the men had brought him out of the sand from the turn road where he was killed and laid him on the gallery; did you go to the place where he was moved from?

A. Yes, sir; I asked Horn and Douglas where he was killed.

Q. You went down to that place; was Bob Blunt there?

A. Yes, sir.

Q. How far was this place from his house to where you went?

A. I suppose it was about 80 yards.

Q. Was there any indications there upon the ground about there as to whether he had been there or not? If so, what was it?

A. Yes, sir; at the torn row coming down east—the old man showed to have been coming down that turn row.

Q. Are you familiar with this map and diagram?

A. Yes, sir.

Q. Is this a correct diagram of the ground up there at that time?

A. Yes, sir.

(Explain' the map.) Here at this turn row is where the old man was lying. About 8 feet, a little behind there, was the prints of a man
69 where he had *sit* on the first row of corn. The man *sit* there leaning against three big stalks of corn, one track on the right and one on the left of the corn ridge. Then, in the second row I think there was another large tracks looked to be a number 9, maybe a number 10, boot stood there in the ground, just north and a little east of where this man sit on that row, and about where the old man's feet was here. He fell backwards in the turn row—I picked up gun wadding that was lying on the ground—I put it in my pocket—the wadding that come out of the gun that killed Box. We then traced the tracks. They come into this turn row that runs north by the orchard; when they got to the orchard here they turned east—I think about 50 or 60 yards they went east; they stopped beside the orchard fence, and they turned and circled until they struck the same turn row, and they left. We could only see the tracks once in a while until they got up here and we missed the trail. When we first went there and went to the outside of the farm, then come around here and went back, we discovered the trail in an oat patch, and we followed it two-thirds of the way across the oats patch, and we discovered some two tracks coming down this way in the oats—running tracks. They showed to be several feet apart. I took the measure of these tracks down here. They proved to be the same tracks that were on here. I disremember whether we turned back on that track or whether we trailed on up beyond them and come back, but we trailed both ways. We trailed the tracks until we struck this block of corn, and there went up the cotton
70 until they got to where the corn commenced, and they circled out in the cotton like that, and then they went into the back yard where Boutwell lived, this defendant.

Q. He lived there at that time?

A. Yes, sir.

Q. What place is that?

A. That is where John Horn lived.

Q. What place is that?

A. That is the little graveyard where Box was buried.

(Explain where each of the defendants lived upon the map. What distance is it from Bob Boutwell's house up to where Box was killed?

A. We stepped the distance; I disremember exactly the number of yards; it taken us 10 minutes to step from Boutwell's house to where the

dead body laid. The way these tracks come here to Box it took us 3 minutes longer to step; my recollection is that it was 1,000 some yards this way and 1,300 and some odd yards this way. I won't be positive; I don't remember.

Q. This is the turn row, if I understand you, coming from Bob Boutwell's going here running south, then in an easterly direction, and here at this point is where you found evidence of where Box was killed?

A. Yes, sir.

Q. What was the character of the soil around here?

A. Sandy soil.

71 Q. Could you notice the tracks of Box along here?

A. No, sir; proof went to show that he left the house and went off on that turn row and come back here.

Q. Did you follow on this trail here to see any track?

A. No, sir.

Q. These are the tracks that you followed?

A. Yes, sir.

Q. Now, then, I understand you to say that there are 2 tracks going from Bob Boutwell's house through around this way?

A. Yes, sir.

Q. What do you mean by 2 tracks; you mean tracks of 2 different men?

A. Yes, sir; one was a very small track, the smallest I nearly ever saw for a man; the other was larger. The small track was not more than a number 5, I don't think.

Q. What size was the large track?

A. I suppose a #9 or #10.

Q. Was there any peculiarity about either or both of those tracks? If so, state what they were.

A. This track here that sit' across that ridge of corn, the boot seemed to be run down.

Q. What was the condition of the toes or heels of it?

A. I did not notice anything at that time about the heel' of the boots.

Q. Did you notice it at any time; was your attention called to it?

72 A. Not until after the boys were arrested.

Q. Did you take the measure of these tracks from here around here going and coming?

A. Yes, sir. I don't remember how many times I did measure them.

Q. Who was along with you at the time?

A. Ed. Berney, John Horn, Jasper Moore, and, I believe, Mr. Ashburn.

Q. Was Hec. Thomas along?

A. Not at that time.

Q. Did you take the measure after that—after Mr. Thomas arrested the boys?

A. He taken the boots off from Bob Boutwell's feet and the boot he supposed John Ball wore.

Q. Where did he get these boots?

A. He found them in a barrel at his house. He taken the shoes off from Filmore Ball's feet.

Q. As to these tracks here; now, I will ask you this: Did you measure the tracks the boot taken off from Bob Boutwell's foot in these tracks here?

A. Yes, sir.
Q. State how it fit.
A. It fit close.
Q. Exactly fit or not?
A. That was the way I saw it.
Q. That was a number 5 boot?
A. Yes, sir.
73 Q. Did you notice anything peculiar about it, whether it was run down or not?
A. Yes, sir; the boot showed to be run down.
Q. Anything peculiar about the heel?
A. The heel had been cut off and inclined to turn this side down; the outer edge was thicker than the inside edge of that heel.
Q. That was the condition of Bob Boutwell's boot?
A. Yes, sir.
Q. Did you measure that boot in the different tracks from here going and coming?
A. Mr. Thomas put it in a good many tracks going and coming.
Q. You stated that the boot of John Ball was taken off; did you apply that in these large tracks?
A. Mr. Thomas placed it in the large tracks.
Q. How well did it fit?
A. It just fit exactly all along; we tried it in several different places.
Q. Heck Thomas is here?
A. Yes, sir.
Q. He did the measuring with these boots after getting them there?
A. Yes, sir.
Q. Anything peculiar about that boot?
A. Yes, sir; the sole of that boot—it was a sewed boot—had been ripped back, and it seemed that it was loose.
74 Q. Any indications there on the ground where it had dragged or struck the ground?
A. I did not notice it until Mr. Thomas called my attention to it.
Q. About what size did you say that was—the large one?
A. It must have been a number 9 or 10.
Q. That was the boot that was pulled off from John's feet?
A. No, sir; we got it at his house.
Q. Anything else about the boot; any cut place on it?
A. Yes, sir; the right boot was split right on the top an inch or an inch and a quarter.
Q. Now, these are the tracks that you followed, the tracks from Bob Boutwell house [indicating] going up here to this place where the killing took place and coming back here; these 2 tracks?
A. Yes, sir; I noticed another trail here by the graveyard.
Q. I want you to describe that.
A. After we got through with that trail there I remarked to the boys, I don't know who done this, but whoever did it come from that opening there; when we come back down here the 2 Garnish boys says, We have struck a different trail. We walked out here. They was digging a grave where the old man had his wife burried in this graveyard and a horse was tied on the outside there, and a man climbed the fence and jumped off on

the west side in the plowed ground and walked in a westerly
75 direction. There was 2 more horses tied down here 40 or 50 yards, and they crossed the fence and come there near the corner of the little graveyard and all come together out there a little west of the graveyard.

Q. How many different tracks was there?

A. 3 tracks, by 3 different persons.

A. We followed them 3 different tracks there on through the orchard here, and when we got out into the apple orcharg I says, "Boys, go and get me a switch and we will measure this middle track; it is too little for the big track and too large for the small track." I measured that track and we followed until it struck the orchard, when it went in the direction of the oats patch and crossed the fence.

Q. How near did you find it come to the oats patch?

A. Within 15 or 20 feet of the oats patch; then they turned around and come back nearly on the same track until they got pretty close to this grave. By the graveyard they separated; this man with the horse turned east, the others come back here and then they come up.

Q. There was evidence of 3 horses out here?

A. Yes, sir.

Q. Was the boots of these defendants here applied to any of these tracks leading from here down there?

A. Yes, sir; they were all applied.

Q. With what result?

A. They fit the tracks.

76 Q. Then the boot of Bob Boutwell's and the boot that you got at John Ball's, that you described here, fit that small track running up here, and the big boot fit the large track of John's?

A. Yes, sir.

Q. What about the 3rd track?

A. It was about a number 7.

Q. Did you get Filmore Ball's shoes and measure in that track?

A. Yes, sir; Mr. Thomas got his shoes and brought them and put them in this track and it fit exactly. That was the first and only place we saw that track, was at that orchard.

Q. Did you notice what direction those horses come?

A. No, sir; there had been a heap of travel going to that dance and I could not tell.

Q. They had a dance at Bob Boutwell's house the night the old man was killed?

A. So I heard; I did not know it until the next morning.

Q. Did you find any wadding there?

A. Yes, sir; about here where the old man's feet was we found some wadding.

Q. How far from him?

A. Very close.

Q. What was the distance from where you noticed these tracks that come here from Bob Boutwell's house up here to where evidence wsa where old man Box was killed?

A. Right close by there.

Q. How many feet?

77 A. I think this little track that sit on that corn ridge was about 8 feet, probably 10 feet, from where the old man was killed.

Q. He was shot; you don't know how he was lying there?

A. No, sir; he had been moved when I got there.

Q. Did this turn row that old man Box was killed in continue on in the direction of his house?

A. Yes, sir.

Q. Who was living with Box?

A. No-body but him and 2 little children—a little boy and girl; his wife was dead.

Q. What kind of wadding did you say it was?

A. I brought the wadding to this court; it ought to be here.

(Witness identifies the wadding.)

A. That is the wadding that is on the ground, that I picked up where the old man was killed. I saw in dressing him some shot very close to the skin on his back, and these 2 shots were taken out of his back the next day. When we were searching to find out where this am'unition came from we were at Bob Boutwell's house.

Q. State what you found.

A. We found this paper there in the drawer of the bureau at Bob Boutwell's house. We compared it—— [Never mind what you done; we don't care what he done.] This shot we found in a shot can at Bob Boutwell's house, in the bureau drawer; we also found a box of caps.

78 Q. You found a can of powder at Bob Boutwell's?

A. Yes, sir.

Q. What did you say about this wadding?

A. That was on the ground by the old man's body.

Q. How did this compare with the wadding you found there? (Objected.) (The paper can be submitted to the jury and they can draw their own opinion. If the paper shows to be a part of the same reading—a part of the same paper—you can show that by putting the paper together and letting the jury inspect it; that is for the jury.)

Q. This is the paper you found in his house—this is the wadding you found?

A. Yes, sir.

Q. How far did you say the wadding was from the body?

A. It was very close; probably 3 feet, may be 4.

Q. These 2 bullets, I understand, that are mashed was the 2 you got out of the body; this round bullet you got out of the gun at Bob Boutwell's?

A. Yes, sir.

Q. Any other bullets that was there except these?

A. I brought down 3 or 4 others of the same kind as these.

Q. What sized bullets are these?

A. Low mould buck shot.

Q. Now, I will ask you to examine that boot; whose boots are those?

A. Those are the boots that was found at John Ball's.

79 Q. This defendant over there?

A. Yes, sir.

Q. Do you know about what number he wore at that time?

A. I do not.

Q. State if they are in the condition now that they were when they were taken from there. Examine them.

A. Yes, sir; just like they was when they were found there.

Q. These are the boots whose mea-ures were placed in those tracks described going from Bob Boutwell's house?

A. The sole was on there tight when it come here.

Q. It has been here how long?

A. 5 years this fall.

Q. I understand you to say these were placed in this track going from Bob Boutwell's; also, in these here.

A. Yes, sir.

Q. Does those boots look like they did when you found them?

A. Yes, sir; when we found it, the only difference I see when the boots were taken out of the barrel they showed to have been worn in the dew or rain, and the sand was dried on it up at the top.

Q. What was the character of dirt on there compared to the character of soil along here?

A. It seemed to be black, sandy, on the boot.

Q. What was the character of this soil here?

A. Black, sandy land.

80 Q. Same kind of soil, then?

A. Yes, sir.

Q. Examine them and state now what boots they are.

A. They are the boots taken off from Robert Boutwell's feet.

Q. The defendant, here?

A. Yes, sir.

Q. That the same track you speak of going from here up to the oats patch?

A. It fit the track that was made there.

Q. What is the condition of that piece? You spoke of it being cut off; that what you had reference to?

A. Yes, sir; the outer part here having that piece on and this part being cut in there.

Q. What was the condition of these boots as to whether they had been in the dew or not?

A. No, sir; they did not show to have been in the dew at all.

Q. What shoes are them?

A. They look to be the shoes of Filmore Ball's. I am not positive about that; I don't remember them as well as I do the boots.

Q. You know where the shoes were—where they got them?

A. Filmore Ball had them on his feet.

Q. They were applied in this track here going and coming from where these horses come back up there?

A. Yes, sir.

Q. What distance was it from where Filmore Ball lived here to

81 Box's house?

A. I don't know; not very far.

Q. How far did Filmore Ball live from Bob Boutwell's?

A. I suppose a quarter of a mile; may be a little farther.

Q. I understood you to say that this new-looking paper, this bullet, and some caps was found at Bob Boutwell's house?

A. Yes, sir.

Q. What portion of the house was it found in?

A. In the top bureau drawer.

Q. You notice the condition of the paper you found in there; any been torn off, or not?

A. Pieces of that kind of paper had been torn off from the opposite corner and one piece left. The am'unition, the shot, and powder were in a can in the top drawer, and a box of caps there and the paper laid there by the am'unition.

Q. Now, in measuring these tracks that you speak of here both ways, did you all get a correct impression of it? Was the character of the soil such that you could get an impression by putting the boots in?

A. Yes, sir; very good. It was not so muddy or so dry. It come a little rain, I think, probably the day before the old man was killed. The next night it did not rain enough to settle the ground or lay the dust good. It was not dry or dusty.

Q. I understood you to say that there was some tracks along here that showed that the parties that made them were running. Which track were they, going or coming back?

82 A. The track going south.

Q. Going in the direction of where this body of old man Box was found—going in that direction?

A. Yes, sir; they were running on that oats patch.

Q. Had that oats patch been plowed up?

A. No, sir; the oats had been cut and harrowed off; the ground was loose, and we could see the track. The little one went into the ground there and flat or deep track.

Q. What does this indicate here coming back?

A. That was the trail we followed from the dead body to the house.

Q. Now, after getting these men and these boots, did you all get the gun?

A. Yes, sir.

Q. Where did you get the gun?

A. We found the gun at John Ball's house.

Q. What kind of a gun?

A. Muzzle-loading, double-barreled shotgun.

Q. State whether or not that showed to have been recently discharged.

A. Yes, sir.

Q. About what length of time?

A. I could not tell.

Q. How could you tell it had been recently discharged?

A. The barrel was smoked around like; I stuck my finger in the muzzle of it and it was dirty.

83 Q. Was it loaded or empty at the time you got it?

A. It was empty.

Q. You know whose gun that was?

A. No, sir.

Q. You know whether these defendants, any of them, claimed that gun?

A. I do not.

Q. That was down at John Ball's house?

A. Yes, sir.

Q. Do you know what distance it is from there to Bob Boutwell's house?

A. Why, I would guess it was about three-quarters of a mile. May be one mile; he lived down there in the timber.

Q. What relation is John Ball to Filmore Ball?

A. A brother.

Q. What relation is John and Filmore Ball to Bob Boutwell?

A. Brother-in-laws.

Q. Bob Boutwell married John and Filmore's sister?

A. Yes, sir.

Q. You know how long they had been living there?

A. No, sir.

Q. Whose place was John Ball working on?

A. He had a little place of his own.

Q. Whose place was Bob Boutwell working on?

A. On old man Box's place.

84 Q. Where was Filmore Ball? Was he working any of this Box place?

A. Yes, sir; he was working on the Box place.

Q. Now, I don't remember, did you state how far this wadding was from old man Box's body?

A. It was right close. His feet was here in that turn row. I picked some of the wadding up to the left of his feet and a little further on I picked up some more.

Q. What evidence was there of where the body had lain?

A. No evidence at all, only blood on the ground there.

Q. What was planted on each side of the corn row?

A. Corn on both sides.

Q. That was the corn here. What was there?

A. That was the old man's orchard.

Q. How many feet was it from the orchard down to where he was killed?

A. I disremember. It was not over 30 or 40 feet.

Q. The impression you speak of where the man sit there with his feet on the corn was where?

A. In the first row of corn that come down by the side of this turn row, right this side of where the old man was lying; east of him.

Q. You noticed large and small tracks you stated. Was that large or small track?

A. The little track was on the corn ridge.

Q. Was the corn ridge flat or high?

85 A. It was a cultivated fair sized corn ridge; not a very high ridge.

Q. Now, was there any corn in between where indications on the ground of where this party was that sit on the corn ridge and where old man Box would have been in that corn ridge—anything to prevent seeing him?

A. No, sir.

Q. Do you remember what kind of a night it was?

A. It was a starlight night; no moon, but a bright, starlight night. That is my recollection.

Q. Now, you examined the wounds on the body. You know whether they went in straight into the body or whether an upward tendency or a downward tendency?

A. All the shot seemed to be pretty nearly straight through.

Q. Did you notice the corn where it was struck by the shot?

A. Yes, sir.

Q. What indications on the corn?

A. It seemed as though the man was sitting down when he fired. The first corn was cut off about that high from the ground; in the next row, 10 inches; then one inch higher, and still on higher until the last stalk was cut off just below the tassel.

Q. How far, now, was this large track that you speak of from this little track where you think the shot was fired from?

86 A. I disremember. It was either in the first or second row of corn back north of where this man had sit there. I am not positive which row it was in. It has been a long time, and my recollection is not as good as it was at that time.

Q. I wish you would state how these tracks led out from Boutwell's house; whether from the back or front of the house, what portion of the yard the tracks that come in the direction of Box and come out by the side of the corn; what part of the yard did they go from?

A. That would be at the southeast corner of the yard. The house fronts the south; the door is in the south.

Q. Where is the horse lot?

A. That is out here.

Q. Now, do you know how far it is from the horse lot to Boutwell's house?

A. 50 or 60 yards; maybe not so far.

Q. About how far is it from where these tracks returned to where they seemed to have lead off; about what distance apart?

A. I suppose 30 steps.

Q. Was there any gate or opening there in getting out?

A. No, sir; no yard fence around the house at all, if I recollect.

Q. Was there any gate or bars in through the field there up to where this occurred?

A. No, sir; just open all the way up there.

Q. Did you notice these horse tracks there hitched on the outside; do you know which way they come or went?

87 A. I could not tell anything about that; there had been a heap of passing along there in the big road, and could not tell anything about the tracks only along there where they were tied.

Q. Now, you spoke about the tracks on this turn row going that way; any tracks coming back from that way where the dead body was about that turn row?

A. I never did examine that turn row at all.

Q. Where were these defendants at at the time they were arrested?

A. John Ball had gone that morning and was working in the cotton patch on Filmore's place. Filmore Ball had gone over to Rider's; he was in the farm out there somewhere. Robert Boutwell, Mr. Thomas, and I went over to his house; he was not there; then we went to old man Howard's, his brother-in-law's, and we found him in the field sitting on his horse talking to his brother-in-law.

Q. Was this a plain traveled turn row here that you trailed?

A. Yes, sir.

Q. The road that led from Bob Boutwell's to old man Box's?

A. Yes, sir; it was only traveled by people that went around the farm; they went out there.

Q. It was a plain turn row?

A. Yes, sir.

Q. I understood you to say the defendants had lived there how long?

A. I think Balls had been there—they was there when I went
88 over there—had been there several years; 5 or 6 years, I guess.

Q. Familiar with the farm, were they?

A. Yes, sir.

Cross-examination:

Q. Who made that map?

A. Ed. Berney.

Q. Who helped him?

A. This map here? I don't know, sir, who helped him; it was made in this house. I brought one down that myself and Ed. Berney made.

Q. Where did you make it at?

A. At my house in Pickens County.

Q. What did you make it for?

A. So it could be shown just exactly how it occurred.

Q. Could you not have come here and told what you knew without a map?

A. Yes, sir.

Q. What did you make it for?

A. Because I thought it would be a good idea to have it.

Q. Have you any interest in any way in the prosecution of this case?

A. None at all.

Q. Any officer or anybody request you to prepare a map of that country and bring it here?

A. No, sir.

89 Q. But you concluded that you would make it?

A. Yes, sir. I thought it was a good idea to have a map to show the locality of the place where the parties lived.

Q. Do you mean to tell this jury these tracks were plain from this house just like you got them all along?

A. We could see them all along until we got into this turn row here, and from here on down we could not see them.

Q. Hain't it a Good's truth that from here to here you never saw a track?

A. No, sir.

Q. You recognized these same tracks?

A. They looked to be; I never measured them.

Q. Tell the distance from where you last tracked until you hit them there?

A. 40 or 50 yards, I suppose.

Q. This field here is oats stubble?

A. Yes, sir.

Q. How long had the oats been cut off from it?

A. Only a short time.

Q. What sort of a soil from there to here?
A. Sandy soil.
Q. Hain't that a hard road down the fence?
A. No, sir; there is no fence there.
Q. (Explains the map.)
Q. Were these going down or coming up?
90 A. They were coming down and these were going up; they struck the corn there; they come down the corn to this turn row; they went back the turn row here; just there we could not tell nothing much about the tracks; down here we could see them plainer.
Q. How near to the body did this track go?
A. I disremember; they went tolerable close.
Q. About how close?
A. I think 10 or 15 feet from the body I saw that track; I am not positive.
Q. You have testified about some tracks going around the body.
A. No, sir; I did not.
Q. There was no such track?
A. No, sir; I did not testify so.
Q. Was there any such tracks there?
A. There was one on this corn row here; another track a piece on the second row.
Q. I believe I asked you if there was any tracks around that body except these shown on that map.
A. There was a track on this side of the body.
Q. I don't say this track here where you found the track on the side of the body—this track here sitting on the corn ridge. Did you see any track other than the tracks shown on this map?
A. I don't remember any only these men that found the old man.
91 Q. Were you with them?
A. No, sir.
Q. What is this intended to represent?
A. 3 tracks.
Q. 3 had come down here and 3 had come back?
A. Yes, sir.
Q. Right here about this graveyard was one party, on the other side of the graveyard, west of this graveyard, was 2 horses hitched there?
A. Yes, sir.
Q. What is that one horse over there and one horse hitched there; were those the same tracks these were?
A. Yes, sir.
Q. You measured them; they were the same tracks you saw over here?
A. Yes, sir.
Q. You put the boots of these defendants in them tracks?
A. Yes, sir.
Q. Up in the field there?
A. Yes, sir; all along.
Q. I will ask you if the shoes of Filmore Ball fit as well as the boots of the other 2.
A. I could not see much difference; they fit very close.
Q. Did you decide the shoes fit the tracks as well as the boots did? Answer my question.

A. We did.

92 Q. Then, when you had examined them with all the care you did and measured the boots, you decided the shoes fit the tracks as well as the boots?

A. I could not see any difference.

Q. This first track measuring was before the arrest?

A. Yes, sir.

Q. That was done very accurately, you say?

A. As much so as could be done.

Q. You had measured as accurately as you could—took measures of all of the tracks. Where are those measures?

A. I don't know. I laid them up over the door of my house; I reckon they are there still.

Q. You was making a map to show the jury about this. Why did you not preserve those measures?

A. I did not think it necessary when we had the shoes and boots.

Q. As soon as you got the boots you did not need the measures; you threw them away and went to making a map?

A. No, sir; they are up there at my house yet, I guess.

Q. They fit these tracks?

A. Yes, sir.

Q. They were correct measures?

A. Yes, sir; as correct as a man could take a measure off from the tracks in the ground. Hard matter to get exactly correct measures.

93 Q. You gave these tracks in the damp sand a close examination before you ever arrested the boys?

A. Yes, sir.

Q. I will ask you if it hain't a fact now that with all the careful examination by the whole party of you before arresting these boys, if any of you discovered anything peculiar about the heels of those boots?

A. I did not.

Q. Did any of the crowd?

A. I don't know.

Q. Was you not there? Did anybody mention it?

A. I don't know.

Q. You got down and measured the tracks, the length and width of them; did you notice it?

A. I never noticed anything peculiar about the heel.

Q. Have you not sworn you measured the tracks accurately and carefully before you ever got these boots?

A. Yes, sir.

Q. The only peculiarity that any of you discovered was that the boot was run down a little?

A. Yes, sir; I noticed that.

Q. After you arrested Bob Boutwell you sent Bob Boutwell and the boys off down to the well; you had them held there under guard, and a lot of you fellows went off to fit these boots in the tracks?

A. Yes, sir.

94 Q. Why did you not take the defendants along and let them see what you were doing?

A. I had nothing to do with that; Hec. Thomas was the man.

Q. Do you swear to this jury that you ever saw any peculiarity in the track?

A. No, sir; I don't.

Q. In all the examination you saw nothing peculiar in the track?

A. I saw that the boot was run down; made a run-down track.

Q. In all the examinations you ever made, you never saw anything peculiar in the track in that boot heel?

A. No, sir.

Q. You never saw any evidence of the sole slipping back until Hec. Thomas discovered something of that sort?

A. No, sir.

Q. Did you see it?

A. I saw scraping on the ground that looked something like it; I don't pretend to say that done it.

Q. That boot is in the condition you got it in the barrel, showing sand dried on it?

A. Yes, sir.

Q. You say you looked at a great many tracks; fit the boots and shoes in a great many tracks?

A. A good many.

95 Q. In all your investigations you saw nothing of the evidence of a sole lapping back except when Mr. Thomas called your attention to it? You never did see anything of the heel being run down?

A. No, sir.

Q. So far as you know there was nothing peculiar about the track?

A. No, sir.

Q. Were you a witness in the examining trial after these witnesses were arrested?

A. Yes, sir.

Q. I will ask you if you did not swear that the tracks came within 3 or 4 feet of that body, parties passing around the body?

A. Probably I did; I don't pretend to say what I testified to then; heap of things that I remembered then that I don't remember now.

Q. If you stated it that way then it is probably true?

A. Yes, sir.

Q. In order to get at that I will see whether or not this is your signature.

A. Yes, sir; that is my signature.

Q. Are you any relative of the deceased Box?

A. No, sir.

Q. The first you heard of the killing of W. T. Box was from a young man named Pruett?

A. Yes, sir.

96 Q. You then started to the place where you supposed the dead man was. Who was with you?

A. Ed. Berney.

Q. Any one else?

A. Not that I remember of.

Q. When you get down to the Box house you found the dead man at home?

A. We was going up the road by the house; this young man said the killing was in the road; we was just passing his house.

Q. He was at the house?

A. Yes, sir.

Q. Who had him there?

A. I don't know from my own knowledge who had him there; I know he was there when I got there.

Q. Who else was there?

A. John Horn, old man Blunt, Mr. Moore, and Bob Blunt was there; I don't remember who else.

Q. Was Will Angling there?

A. I don't remember that he was; he might have been there.

Q. Do you know why that dead man was carried up to the house after he was found there cold and stiff?

A. No, sir; don't know anything about it.

Q. Then you say Bob Blunt went with you to show you where the man was lying?

A. No, sir; some of them that had brought the old man in, I
97 think Horn and Moore, and probably Blunt; some staid with the corpse and others went to show me where the old man laid.

Q. I will ask you if the defendant, Filmore Ball, was there that morning?

A. I did not see him.

A. I saw him that evening; he got there a little before sundown.

Q. Do you know who went and got the burial outfit for the old man Box?

A. I think Filmore Ball went.

Q. He was a son-in-law of Box?

A. Yes, sir.

Q. You think he went?

A. Yes, sir.

Q. Who had those little children after the man was dressed to be buried?

A. I think Filmore Ball carried them home with him.

Q. Who took the dead man's papers that day?

A. I could not tell you.

Q. I will ask you if you and Ed. Berney did not have those papers?

A. I did not.

Q. Did Ed. Berney in your presence?

A. The papers were examined by Horn and Berney among them; I don't know who had them.

Q. I will ask you if you did not examine those papers, and if some of you did not take them? Tell this jury what you and Horn and Ed. Berney were examining that dead man's papers for.

98 A. Because they were there; I don't know who suggested that we had better examine and see what shape they were in and give them to Filmore Ball.

Q. Did you ever give them to Filmore Ball?

A. I don't know.

Q. Don't you know he never got them?

A. I think his wife got them.

Q. Tell us how long after that man had been buried when she got them?

A. I don't know.

Q. How do you know she got them?

A. I don't know; I think she did.

Q. How can you explain that you fellows examined the dead man's papers before he was buried?

A. I came in when Berney and Horn were examining the papers. I was probably in there when they got the papers; I don't remember. I know the papers were examined and I think Ed. Berney taken charge of the papers and turned them over to Filmore Ball's wife.

Q. Tell this jury how long you had been there before the process of examining papers began?

A. Nearly all day.

Q. What time did you commence examining the papers?

A. I could not tell you; along 12 or afterwards.

Q. Ball and Boutwell were not arrested at that time?

99 A. No, sir; they were not arrested until the next morning.

Q. What time the next morning when they were arrested?

A. About 9 or 10 o'clock, may be.

Q. Then you do not know of your own knowledge what Ed. Berney and Horn did with the papers of Box?

A. I think Berney rolled up the papers and said was he going to give them to Filmore Ball's wife.

Q. Was Box a citizen of the Chic'asaw Nation?

A. Yes, sir; his first wife was a Chic'asaw woman.

Q. Was she an Indian woman?

A. Yes, sir.

Q. Filmore Ball's wife her daughter?

A. Yes, sir.

Q. Old man Box was the father of Filmore Ball's wife?

A. Yes, sir.

Q. Did you know Filmore Ball and Box's daughter lived there as husband and wife, did you?

A. Yes, sir.

Q. She is that woman you speak of as Filmore Ball's wife?

A. Yes, sir.

Q. Do you know who employed Col. Cravens to prosecute these defendants?

A. Yes, sir; Wes Berney.

Q. That is the man you speak of being with you in measuring these tracks?

A. No, sir; that was his brother.

100 Q. Is he here now?

A. No, sir.

Q. Do you know who employed Mr. Birmingham to help prosecute in this case?

A. Yes, sir; Ed. Berney.

Q. He is the one that is here?

A. Yes, sir.

Q. Who employed Mr. Ownby?

A. Ed. Berney and myself employed Mr. Ownby.

Q. You paid him out of your private means?

A. I always pay my debts that way.

Q. How much do you pay him?

To which question and proposed answer counsel for the Government objected. Defendant's counsel then stated to the court that they desired said proof for the purpose of showing the interest of the witness in this prosecution, as well as to show the interest of Ed. Berney, another material witness for the Government, but the court sustained the objection so made by the Government, and would not permit said question to be answered, to which action and ruling of the court the defendants each at the time excepted.

Q. When did this employment take place, of Mr. Ownby?

A. Friday or Saturday.

Q. Since you came down here this time?

A. Yes, sir.

101 Q. I understood you to say that you did not take those papers that were examined; that Ed. Berney or Horn had the papers?

A. I did not take them. I picked up two or three and looked at them. I did not have my glasses and could not see, and I laid them down.

Re-direct:

Q. I understood you to say that Col. Cravens is not here. He was employed, but failed to come.

A. Yes, sir; he failed to come to this court, and we employed Mr. Owenby.

Q. I will ask you if you did not ask me in regard to it, and ask if it was satisfactory, and I told you it was very acceptable, indeed.

A. Yes, sir.

Q. I will ask you if, at the time you speak of employing Col. Cravens, if he and Mr. Birmingham were not in partnership, that was how his connection come with it?

A. That was my understanding with regards to Mr. Birmingham.

Q. Mr. Birmingham said that Col. Cravens accepted the fee, and he was responsible and not Mr. Birmingham.

A. Yes, sir.

Q. You spoke of Filmore Ball here marrying the daughter of Box. Do you know what kind of terms Filmore was on with Box at the time of the killing?

A. All I know is what I got from old man Box.

Q. (We object to that.)

102 Q. Do you know whether they were on good terms from anything you heard from both sides, Filmore here, these defendants; what you heard them say whether or not they were on good terms?

A. No, sir; I don't remember that I ever heard the defendants say anything about it, except one time I heard Filmore remark to Berney, the day the old man was a corpse; he said that he would not have had that happened for a thousand dollars, because of the terms they were on; he was afraid they would suspicion him.

Q. Was that before he was arrested charged with the crime?

A. Yes, sir.

Q. You spoke of him marrying this girl; who was his wife before he married her?

A. Her name was Mayfield.

Q. She had a husband living; she had been lawfully married, and this was a subsequent marriage?

We object to it.

I asked him who was the first husband of Filmore Ball's wife; he said Mayfield; I asked whether they were lawfully married.

He can not prove that.

But, your honor, here is the point in it, the defendants' counsel in this case asked this witness what relation Filmore Ball was to old man Box; he said he was a son-in-law, that he had married his daughter; they have gone into that and we think we have a right to re-cross upon it.

By JUDGE. You have a right to do that, but you want to confine it to what they asked.

We objected to the question, not to his inquiring into that particular matter.

Q. I understood you to say that her first husband was Mayfield.

103 Did they live together as man and wife?

A. Yes, sir.

Q. Mayfield is still alive?

A. He was the last I heard of him; I don't know now.

Q. Do you know of your own knowledge of Box, the deceased, making a complaint against this defendant, Filmore Ball, about living with his daughter unlawfully?

A. No, sir; not of my own knowledge.

* * * * * * *

136 BOB BLUNT.

Do you know these defendants here, John Ball, Filmore Ball, and Bob Boutwell?

A. Yes, sir.

Q. Did you know Wm. Box?

A. Yes, sir.

Q. State whether or not you saw anything of Box the morning following the dance at Bob Boutwell's?

A. Yes, sir; I saw him.

Q. Where did you see him?

A. I saw him lying in the turn row of his field.

Q. Was anyone with you at the time?

A. No, sir.

Q. You were alone?

A. Yes, sir.

Q. Were you walking or riding?

A. I was riding.

137 Q. What was you doing?

A. I was starting over to my uncle's across his farm; I always went that way.

Q. How come you to see him; were you the first person that saw him there that morning after the killing so far as you know?

A. Yes, sir.

Q. What did you do as soon as you saw him?

A. As soon as I saw him I called to him; he did not move; I turned around and went back to his house to see if his children were there; his

children were out on the porch; I took the little child and went back out there; his little boy went to him and shook him; he seemed to be stif' from where I was at; I could not get my horse close, and I never got off from my horse.

Q. What sized boy was he?

A. He was 6 or 7 years old.

Q. Did he walk or ride out there with you?

A. He walked from the house out there.

Q. You rode back out there?

A. Yes, sir.

Q. You say you had him to go to the body and shake it, and you found then that he was dead?

A. Yes, sir.

Q. What occurred then?

A. I went off after a crowd.

Q. What become of the little boy?

I left him with his father.

138 Q. Who was the first person you went to?

A. I went to Gray's house; the men persons were gone and I went to Ashburne; he was in the field; he went to my father's, and I turned and went to Horn.

Q. You went along the Box farm notifying all of them that old man Box was dead there?

A. Yes, sir.

Q. How was he lying when you got there?

A. On his back.

Q. Did the little boy move him?

A. No, sir; he only took him by the knee and shook him.

Q. When you come back did you come back with any of the boys?

A. Yes, sir.

Q. How was he lying when you got back?

A. He was still lying there in the same position as when I first left him.

Q. Was the little boy there?

A. I don't recollect whether he was or not.

Q. Did Ashby come on there as soon as you notified him?

A. Yes, sir; I think he did.

Q. How far was it from Ashby's over there?

A. I reckon between three quarters and a mile.

Q. This same Ashby that is here?

A. No, sir; a brother of the one that is here.

Q. You gave the alarm; notified the parties around there?

A. Yes, sir.

139 Q. Old man Blunt your father?

A. Yes, sir.

Q. Did he go there before the body was moved any?

A. Yes, sir.

Q. Who moved him?

A. I don't know; my father helped, for one.

Q. Who else?

A. John Horn; I don't know who else.

Q. Your father and Mr. Horn were 2 of the parties.
A. Yes, sir.
Q. How many were there helping carry him in?
A. 4; there might have been 6.
Q. Anything there about him, lying about him, near him?
A. His hat was lying there close to him and his pipe.
Q. How close was his pipe to him?
A. Looked like it had dropped out of his mouth right down by the side of his head.
Q. State now if you saw anything of these defendants, Bob Boutwell, John Ball, and Filmore Ball, on the night before the killing.
A. Yes, sir.
Q. Where did you see them at?
A. At a party at Bob Boutwell's house.
Q. Were you at that dance?
A. Yes, sir.
Q. How long did you stay there that night?
140 A. I staid until the party broke.
Q. What time did it break up?
A. I don't know.
Q. About what time did it break up?
A. Between 3 and 4 o'clock.
Q. Had you seen anything of these defendants here on the afternoon before the dance that night?
A. Yes, sir.
Q. Where did you see them?
A. I saw them between Berneyville and my house.
Q. Where were they going?
A. Across the river from where we lived.
Q. Where to?
A. To a saloon over there.
Q. Which ones; all 3 of them?
A. Yes, sir; they were all 3 together.
Q. Filmore Ball, John Ball, and Bob Boutwell?
A. Yes, sir.
Q. What time in the evening was that?
A. An hour, or an hour and a half, by sun.
Q. How far from where you saw them over to where this saloon was?
A. About 2½ miles.
Q. Did you see them as they returned?
A. I went with them over from where I met them.
141 Q. Did you come back with them?
A. Yes, sir.
Q. Where did you separate from them?
A. We separated; Bob Boutwell rode off just after we passed Mr. Christoford's, and me and the others went on to where we come to my father's field.
(Look at this diagram.)
Q. Were you near to John Ball's house?
A. No, sir; we was down close to Berneyville—about 2 miles from there.

Q. Where were you at when you separated with them? You went over and come back with them; did you separate from them before you went to the dance?

A. Yes, sir; Bob Boutwell rode off from us—separated from us at the corner of my father's field.

Q. When you stopped here where did you leave these defendants? did you leave all of them together?

A. No, sir; nobody but John Ball. I left him at the corner of the fence and he went to his house there and I went home.

Q. Where did Bob and Filmore and John next go?

A. Bob and John went on to the saloon; Filmore stopped at Berneyville.

A. He did not come back with you and Bob?

A. No, sir.

142 Q. You got to your father's, you stopped there; John went to his house and Bob started towards his?

A. Yes, sir; he went up on that road towards home.

Q. What time of day was that?

A. That was getting very late in the evening.

Q. Anyone else along with them?

A. No, sir.

Q. Was anything said that evening going over or coming back, by either of these defendants, about what they were going to do with the liquor?

A. They never said nothing about what they were going to do with it.

Q. How is it Filmore did not come back with you all?

A. He stopped at Berneyville, and I never saw him any more until that night.

Q. Was he riding?

A. Yes, sir.

Q. John riding?

A. Yes, sir.

Q. Have any shotgun when you saw them last?

A. No, sir.

Q. Was anything said about old man Box that night? If so, what was it?

A. No, sir; they never said nothing to me.

Q. Do hear them say whether he would be down at the dance that night?

A. No, sir.

143 Q. Was he at the dance that night?

A. Yes, sir.

Q. You know how he come to be there—you know who invited him?

A. No, sir.

Q. Did you hear Boutwell say anything about it?

A. No, sir.

Q. Any of these defendants?

A. No, sir; I did not.

Q. Did you see him when he came there that night?

A. No, sir; he was there when I come.

Q. Who did you go with?

A. My father and them.

Q. Who else? Are you a brother of Nanney Blunt?
A. Yes, sir.
Q. Did she go with you?
A. No, sir; a young man had her.
Q. You were at the dance?
A. Yes, sir.
Q. Staid there until it broke up that night?
A. Yes, sir.
Q. Did you see John Ball there?
A. Yes, sir.
Q. Bob Boutwell?
A. Yes, sir.
Q. Filmore Ball?
A. Yes, sir.
144 Q. What was Filmore doing?
A. He was playing the fiddle.
Q. Who played with him?
A. John Hayes and Ed. Rodgers.
Q. Do you remember about the time old man Box left there?
A. No, sir.
Q. Do you remember of about the last set that was danced there of anything that took place—did you dance yourself?
A. Yes, sir.
Q. Who did you dance with?
A. Bob Boutwell's wife.
Q. Tell this jury how you come to dance with his wife?
A. They were on the floor and Bob Boutwell touched my shoulder and asked me if I did not want to dance; I told him I did not care; he says take my place, I have got a partner.
Q. Had they formed a set on the floor at the time?
A. Yes, sir.
Q. He had gone there and was going to dance with his wife?
A. Yes, sir.
Q. He came to you and asked you to dance in his place?
A. Yes, sir.
Q. What become of Bob Boutwell after you took his place?
A. I don't know; I never saw him any more.
Q. Do you know whether he went out of the north or south door?
A. No, sir.
145 Q. How long was it from that time until you next saw Bob Boutwell?
A. The next day sometime.
Q. Did you see anything more of him that night?
A. No, sir.
Q. Was he living there at this place?
A. Yes, sir.
Q. That is where the dance was?
A. Yes, sir.
Q. He went off, you saw nothing more of him that night?
A. No, sir.
Q. How long did you stay there after he left you on the floor?
A. We danced the set out.

Q. What length of time do you suppose you was there after that?

A. I could not say.

Q. Did you notice anything that occurred between Filmore Ball and Bob Boutwell at the time you took his place—did you see anything?

A. No, sir; I did not.

Q. Where was John Ball; did you see anything of him after Bob Boutwell come to you to take his place on the floor?

A. No, sir.

Q. How long had it been since you saw him before that?

A. I don't remember, I don't think long, though.

Q. Did you see anything of John any more that night after you begun dancing this set with Mrs. Boutwell?

A. No, sir; I did not.

146 Q. How did you go home that night?

A. I rode home behind John Ashby.

Q. Were there many at the dance that night?

A. Yes, sir; a good many.

Q. Did you get there before Filmore that night, or after?

A. I don't recollect.

Q. Did you hear any shooting that night?

A. No, sir.

Q. Were you all dancing there for some time after Boutwell left?

A. Long enough to dance out the set; 20 or 25 minutes, I suppose.

Q. The set was just begun when Boutwell got you to take his place?

A. Yes, sir.

Q. Now, when they begun to break up there, state what Filmore said or done; whether or not he insisted on them keeping on?

A. He just got out on the floor and played the fiddle and danced around, and got in the door and said stay longer, or don't hurry off, or keep on dancing, something to that amount; I don't remember exactly what it was, it has been so long.

Q. You spoke about that little boy that went out there with you; did he have shoes on or was he barefooted?

A. He was barefooted, I believe.

Q. You stated he was 6 years of age?

A. 6 or 7, I don't know exactly.

147 Cross-examination:

Q. What is the name of that uncle of yours that you was going to see that morning?

A. Rider.

Q. What was you going over there for?

A. Just because I wanted to.

Q. What day of the week was it?

A. I don't remember exactly.

Q. What business were you engaged in that time?

A. I was working on the farm.

Q. Was that a good day to work?

A. Tolerable; yes, sir.

Q. Why were you not at work that day?

A. Because I did not feel very well after being up at the dance, and I had business at Rider's.

Q. What was that business?
A. I don't know; his wife had come over there.
Q. If it is some private matters of the family, I don't want to inquire into that. You had gone over there to see about some matters connected with your family?
A. Yes, sir.
Q. You went through the field and found Box dead?
A. Yes, sir.
Q. Did you get off from your horse?
A. No, sir.
148 Q. You started out to notify persons that he was dead, and you went and notified Filmore?
A. Yes, sir.
Q. Then you went on notifying somebody else?
A. Yes, sir.
Q. When you got down to the corpse, I will ask you if Filmore was not there and helped carry the body to the house?
A. I don't remember.
Q. Was he there?
A. I don't think he was there as well as I remember.
Q. Did John Ball go down there with you?
A. I think he did.
Q. He went with you as soon as he ascertained the man had been killed?
A. I think so.
Q. That is your recollection, that John went with you?
A. Yes, sir.
Q. You say that Filmore went with you all to the saloon that evening?
A. No, sir.
Q. What did you say about it?
A. He did not go.
Q. You did not mean to say that all the defendants went with you?
A. No, sir.
149 Q. The defendants John Ball and Bob Boutwell were along, but Filmore was not with you?
A. No, sir.
Q. Where did you say you were when Bob rode on?
A. Between Christoford's and Pollard's old store.
Q. Did you see anything of Nelson Jones that evening?
A. Yes, sir; I did.
Q. Did you stop and fix your saddle that evening on the road?
A. Yes, sir.
Q. Did you stop before you got to Christoford's or afterwards?
A. Before.
Q. Who stopped back with you—anybody? How come Bob Boutwell to get ahead of you?
A. Because I stopped to tighten my saddle.
Q. When you stopped to tighten your saddle Boutwell got ahead?
A. Yes, sir.
Q. Who stopped with you?
A. John Ball.

Q. You stopped to tighten your saddle and Bob Boutwell got ahead of you?

A. I caught up with them; me and John rode slow and he rode on as hard as he could ride.

Q. You say you stopped before you got to Christoford's and fixed the saddle, then you and John was together all the way on from there?

A. Yes, sir.

150 Q. Boutwell loped on ahead?

A. Yes, sir.

Q. That is the fact about it?

A. Yes, sir.

Q. What sort of a horse was Boutwell riding?

A. A yellow horse.

Q. You say that the last set that was danced Boutwell come to you and asked you to dance with his wife?

A. I suppose that was the last set.

Q. I want to know if that was the last set?

A. As well as I recollect; I think it was.

Q. You think you know that was the last set danced that night?

A. Yes, sir.

Q. You danced with Boutwell's wife; who played the fiddle?

A. I think Filmore Ball and John Hayes.

Q. Don't you know Filmore played for that set?

A. Yes, sir; I believe I do know Filmore played that set.

Q. There was 3 fiddlers there?

A. Yes, sir.

Q. You know what went with the other fiddlers?

A. No, sir.

Q. Do you remember of ever seeing these fiddlers after that set commenced that night?

A. I don't remember.

Q. Do you remember of seeing Will Angling that night after that set?

151 A. Yes, sir; I saw him in the yard and saw him at my house.

Q. What is the name of this other fiddler?

A. Ed. Rice.

Q. You know he did not play in that set?

A. I don't think he did.

Q. Hain't you certain he did not?

A. No, I hain't certain.

Q. You have no recollection of his playing?

A. No, sir.

Q. You don't think he did?

A. No, sir.

Q. You don't remember of seeing him after that set commenced?

A. No, sir.

Q. How many persons were there at the commencing of that last set?

A. I expect there was 30 or 40 or maybe 50.

Q. How many of that 30 or 40 or 50 can you remember of seeing after that last set commenced?

A. I paid no attention.

Q. Hain't it a fact that there is a very few of them that you remember of seeing after that set commenced?

A. I saw a good many after that set broke.

Q. You don't know whether Boutwell was there or not?

A. No, sir.

Q. You don't know whether John Ball was there or not?

A. No, sir.

152 Q. You do know that Filmore played for that set?

A. Yes, sir.

Q. You cannot say whether Boutwell and John Ball were there or not, because there were 30 or 40 or 50 there and you don't know who they were?

A. No, sir; I could not say.

Q. Do you know Nelson Jones?

A. Yes, sir.

Q. I will ask you if you did not tell him that as you passed by Christoford's that you and John Ball were together and talking about killing; said you was going to have a killing time that night?

A. No, sir.

Q. At Berneyville, shortly after this killing, if you did not tell him that?

A. No, sir.

Q. You know him?

A. Yes, sir.

Q. You never said anything of that sort to him?

A. No, sir.

Q. I will ask you if you did not tell him that you and John passed that man Christoford's house together and that Bob was ahead a quarter of a mile?

A. No, sir.

Q. Haint it a fact that you did pass by the house together?

A. No, sir.

153 Q. I will ask you if you did not state that you stopped to fix your saddle and Boutwell got ahead?

A. Yes, sir; but after we passed Christoford's I loped up and caught up with them.

Q. Did you not stop to fix your saddle before you got to Christoford's house?

A. No, sir.

Q. Do you tell thie jury that you had passed Christoford's when you stopped to fix your saddle?

A. No, sir.

Q. Don't you know you fixed your saddle before you passed Christoford's house?

A. Yes, sir.

Q. Don't you know you and John were together from the place you fixed your saddle clear on?

A. No, sir; he rode on off from me when I had to fix my saddle. When I overtook him I stayed with him.

Q. Where was it the defendant Boutwell rode off from you?

A. After I caught up with them John slacked up.

Q. Were you all 3 together when you passed Christoford's house?
A. No, sir; I stopped there and was tightening my saddle before we got to Christoford's.
Q. You was not with them when they passed Christoford's?
A. I was riding along not very far behind them.
Q. How far were you behind them?
A. I never measured the distance.
154 Q. How far were you from John?
A. I never measured that distance; I suppose they were together.

* * * * * * *

194 BUD ASHBY.

Do you know these 3 defendants, Bob Boutwell and the 2 Ball's?
A. Yes, sir.
Q. Were you at a dance at Bob Boutwell's on the 25 of June, 1889?
A. Yes, sir.
Q. Did you see all of these defendants there that night?
A. Yes, sir.
Q. Did you see old man Box there?
A. Yes, sir.
195 Q. Did you remain there until the party broke up that night?
A. Yes, sir.
Q. Now, do you remember about what time it was when old man Box left there to go home?
A. Yes, sir; I know that just a while before the dance broke up that I was talking to him sitting out on the gallery; I went into the house, and I suppose he left about that time. I never saw him any more.
Q. Did you see which way he went?
A. No, sir.
Q. When you saw Box there fixing to leave, did you see anything of John Ball, one of these defendants, and where at?
A. As I come on the gallery, I come out from where John was sitting or standing at the east end of the house talking; as I stepped on the gallery I saw old man Box was there.
Q. What did Box say to you?
A. He wanted me to go home with him; I told him I could not go, and I left him there.
Q. Where was John Ball at that time?
A. He was at the east end of the house, 10 or 15 feet from there.
Q. How close was he to where old man Box started home?
A. About 10 steps from where I left him on the gallery.
Q. Do you know what become of John Ball immediately after that?
A. No, sir; I do not.
196 Q. You say he was 10 steps from old man Box when he left him out in the yard; was he walking to where old man Box was?
A. I suppose he was.
Q. That is the time you saw old man Box getting ready to go home?
A. I suppose so. He wanted me to go home with him.
Q. Was you talking to him there?
A. Yes, sir.

Q. Was John Ball close enough to hear you?
A. I suppose he was, if he had been listening.
Q. What was John doing out there?
A. He was talking to some party; I don't know who it was.
Q. You know how long he had been out there?
A. No, sir.
Q. Did you see anything more of John there that night after that?
A. No, sir; I did not.
Q. That was the last you saw of him?
A. Yes, sir.
Q. Were you there when the dance broke up?
A. Yes, sir.
Q. Did you see anything of this other defendant, Bob Boutwell?
A. No, sir.
Q. Where was Filmore when the dance broke?
A. He was in the house playing the fiddle.

197 Cross-examination:

Q. What time did you go to the dance?
A. I lived there. I was there when it begun.
Q. Did Box dance any that night?
A. No, sir. If he did I never saw him.
Q. Box never danced that you saw; you was there all the time?
A. I was not in the house all the time, but I don't think he danced any?
Q. If he danced any you did not see it?
A. No, sir.
Q. What was the crowd doing in the house when he left?
A. I suppose they were dancing when the old man left; I never saw him leave. They were dancing when me and him was talking on the gallery. I don't know what they were doing when he left.
Q. How many sets were danced after he left?
A. I could not say. I don't know exactly when he left. There was one or 2 sets danced after I saw him standing on the gallery. They was dancing then.
Q. Did they dance one or 2 sets after that?
A. I could not say whether they danced one or two sets.
Q. You know there was one or 2 sets danced?
A. I know they danced on. I don't know how many sets they danced.

198 Q. What did you do after you left Box?
A. I went into the house.
Q. You went into the house, and they danced, to the best of your recollection, one or two sets?
A. Yes, sir.
Q. Did he tell you good-bye?
A. No, sir.
Q. Did he not tell you good-bye in the presence of Blunt?
A. No, sir.
Q. You know Blunt?
A. Yes, sir.

Q. Do you tell this jury that he did not tell you good-bye in the presence of Blunt?
A. If he did I did not hear him.
Q. You know the witness Blunt?
A. Yes, sir.
Q. You saw him there when you was talking on the gallery to old man Box?
A. If I did I don't remember it.
Q. Anybody else there?
A. Yes, sir; there was some on the gallery.
Q. Who was playing the fiddle when you went back into the house?
A. Filmore Ball, John Hayes, and Ed. Rice.
Q. How long do you think the dancing continued after you saw Box on the gallery?
199 A. I could not say positively how long. I don't remember. It might have been 15 or 20 minutes and it might have been longer.
Q. Did you hear anybody halloa there that night for anybody?
A. No, sir.
Q. You was out in the front, was you?
A. I was not at the front during the dance.
Q. When the dance broke up where did you go?
A. I went to Filmore Ball's.
Q. How long after the dance broke up before you left?
A. I suppose we stayed there in the house may be 15 or 20 minutes.
Q. Then you went out, and heard no halloaing for anybody?
A. No, sir.
Q. Who did you go home with?
A. Amy Box.
Q. Who is Amy Box?
A. Filmore Ball's sister-in-law; old man Box's daughter.
Q. Anybody else with you?
A. Filmore Ball and Lucy Ball.
Q. Why did you not tell me that Filmore Ball went with you?
A. They were not with me; I was with this young lady.
Q. Did you stay all night there?
A. Yes, sir.
Q. Who else was with you?
A. Chas. Horn.
200 Q. You went home with Filmore?
A. Yes, sir.
Q. What time was it when you got there?
A. I suppose between one and 2 o'clock.
Q. Filmore's wife was with him?
A. Yes, sir.
Q. They went on home and went to bed as usual?
A. I don't know; Filmore's wife and sister-in-law went into the house; I and Filmore and Chas. Horn stopped in the yard. Filmore says I have left my 6-shooter over at Bob's, and I will have to go back after it. Chas. Horn says we will go back after it for you; he says no, let it alone, and I and Chas. Horn went down into the dugout and went to bed and Filmore went into the house.

Q. Tell this jury whether Filmore had on boots or shoes that night.
A. I could not say.
Q. Don't you know he had on boots?
A. No, sir.
Q. Don't you know he come into the dugout the next morning and got his shoes?
A. I don't know.
Q. Did you not swear that on the examining trial?
A. No, sir.
Q. Who slept with you?
A. Chas. Horn.
201 Q. Was his shoes in the dugout?
A. I don't know.
Q. You don't remember about that?
A. No, sir. I know I never saw him come in there after them; if they were in there I never saw them.

Redirect:

Q. You say you went to Filmore's and staid all night that night?
A. Yes, sir.
Q. Slept in the dugout with Chas. Horn?
A. Yes, sir.
Q. You say that Filmore wanted to go back over to Bob Boutwell's to get his 6-shooter; you and Horn offered to go after it; he says no, let it alone?
Q. You don't know what become of Filmore after that?
A. No, sir.
Q. Were you out to the lot after that?
A. No, sir.
Q. Anybody come there that night?
A. No, sir.
Q. You there the next morning?
A. Yes, sir.
Q. You notice Filmore's horse there?
A. Yes, sir.
Q. How many was in the lot?
A. 2.
202 Q. You know how they come there?
A. No, sir; I do not.
Q. Anybody else there the next morning?
A. No, sir.
Q. What time was it the next morning when you went to the lot?
A. Well, I suppose the sun was nearly an hour and a half high when we got up.
Q. Both horses were in the lot at that time?
A. Yes, sir.
Q. Did you hear Filmore say anything about his horse?
A. No, sir.
Q. Hear him say anything about where he had been, whether he had been over to Bob's?
A. No, sir.
Q. Did he have his his pistol next morning?

A. No, sir; I never heard him say anything about it.

Q. Did you hear anyone riding off, or anyone coming there riding, after you went down in the dugout?

A. No, sir.

Q. How far was the lot from the house?

A. 15 or 20 steps.

Q. How far to the crib?

A. 30 or 40 steps.

Q. Do you know whether anyone had borrowed one of Filmore's horses that evening or not?

203 A. Yes, sir; Will Frazier borrowed one.

Q. You know when he come with the horse?

A. No, sir.

Q. Was the horse Will Frazier had in the lot the next morning?

A. Yes, sir.

Q. Then another horse in there?

A. Yes, sir.

Q. You know where Will Frazier was that night?

A. He was at the dance, and I suppose he went home.

Q. Did you see anything of him after the dance broke up?

A. No, sir.

Q. You know when he come home?

A. No, sir.

Q. The horse was in the lot the next morning?

A. Yes, sir.

TOMMY BLUNT.

Do you know these defendants, Bob Boutwell, John Ball, and Filmore Ball?

A. Yes, sir.

Q. Did you know old man Wm. Box?

A. Yes, sir.

Q. Were you down at a party at Bob Boutwell's the night that old man Box was killed?

A. Yes, sir.

Q. Did you see these defendants there that night?

A. Yes, sir.

204 Q. You remember of seeing old man Box there?

A. Yes, sir.

Q. You remember about the time old man Box left there to go home?

A. No, sir; I don't remember.

Q. You remember the last set that was danced there that night?

A. Yes, sir.

Q. That set or the next to the last?

A. Yes, sir.

Q. Did you see any of these defendants here on the floor dancing or starting to dance that set?

A. Yes, sir.

Q. Which one?

A. Bob Boutwell.

Q. Who was he starting to dance with?

A. With his wife.

Q. Did you see anything of John Ball there?
A. No, sir.
Q. Did you see him on the outside of the house?
A. No, sir.
Q. Did you see him at any time during the time of the dance there?
A. Yes, sir; I saw him there that night.
Q. Where was he at?
A. He was there in the house.
205 Q. Did you see him there about the time of the last set?
A. No, sir.
Q. Did you see anything of John Ball after Box was gone; did you see him come in the house then?
A. No, sir.
Q. Did you see Bob Boutwell in there?
A. Yes, sir.
Q. What did you see him do when he came out on the floor to dance?
A. He called at my brother to take his place—to dance at his place—and my brother took his place, and he went out at the south door.
Q. How did Bob Boutwell—— Did you see him talk to anybody else before he went out?
A. No, sir.
Q. Did you see him speak to Filmore before he went out?
A. No, sir.
Q. Which door did you see him go out at?
A. At the south door.
Q. You saw him go out of the south door after Bob Blunt took his place?
A. Yes, sir.
Q. Which door were you at?
A. I was at the south door.
Q. Did you hear any gun that night?
A. Yes, sir.
206 Q. What direction was it in?
A. In the direction of Mr. Box's.
Q. What kind of a report did it make?
A. It sounded to me like a shotgun.
Q. About how long was that after you saw Bob Boutwell go out of the house?
A. Between 10 and 15 minutes, as well as I remember.
Q. From the time you saw Bob Boutwell go out of the south door it was about 15 minutes until you heard a gun fired in that direction?
A. Yes, sir.
Q. Did you see anything more of John Ball or Bob Boutwell that night?
A. No, sir.
Q. You saw nothing more of John there?
A. No, sir.
Q. Who was playing the fiddle at that time?
A. I don't remember who was helping Filmore; I think Filmore was playing.
Q. Do you know whether Hayes was in there fiddling at that time?
A. No, sir; I do not.

Q. How long had you missed old man Box at the time you saw Bob Boutwell go out of that south door?

A. I don't remember.

207 Q. That was the set that he got up to dance with his wife at the time your brother took his place?

A. Yes, sir.

Cross-examination:

Q. This is the first time you have ever been a witness, *h*ain't it?

A. Yes, sir.

Q. Who did you ever talk to about this case?

A. I don't know as I ever talked to any one about it.

Q. Never talked to any one about it?

A. Nothing more than just a conversation about it.

Q. Who did you have a conversation about it with?

A. It was all the talk, as far as that is concerned, amongst the neighbors there.

Q. You were at the south door?

A. Yes, sir.

Q. Bob got on the floor with his wife to dance?

A. Yes, sir.

Q. Who took his place?

A. Bob Blunt.

Q. How come him to call Bob Blunt and ask him to take his place? How far was your brother from you?

A. He was in the southwest corner of the room.

Q. What was he doing over there?

A. I don't remember.

208 Q. Did he have a partner over in the southwest corner?

A. I don't remember.

Q. Don't you know your brother was on the floor with a partner for that identical set?

A. No, sir; he was not until Bob got him to take his place.

Q. What was he doing over there?

A. I don't remember.

Q. How happened you to be noticing Bob so particular then?

A. I just happened to notice him get my brother to take his place.

Q. Can you tell anybody else that danced that set?

A. No, sir.

Q. Who has talked to you about this case?

A. Well, I don't know.

Q. You know exactly what Bob Boutwell done?

A. I know he got my brother to take his place.

Q. You don't know another pair on the floor?

A. Yes, sir; my sister was on the floor.

Q. Who danced with her?

A. I don't remember.

Q. Tell this jury who else danced that set beside Bob Boutwell's wife and your brother.

A. My sister. I don't know who else.

Q. Who else danced that set?

A. I don't know.

209 Q. Don't you know any of them people?
A. I reckon I do.
Q. How does it happen that you know just the movements of Bob Boutwell and your brother and don't know anybody else?
A. I just happened to notice Bob Boutwell get my brother to dance in his place.
Q. How did you happen to notice that?
A. Because after that he got his hat and left the house.
Q. Where did he get his hat from?
A. From the south side of the house.
Q. Which way did he go out?
A. He went out of the south door.
Q. Where did he go?
A. I don't know.
Q. Where was the fiddlers standing?
A. They were sitting on the west side of the house.
Q. Was there *a*ne or 2?
A. I think 2.
Q. Who do you think they was?
A. One was Filmore Ball?
Q. He staid there and played the fiddle through that set, did he?
A. Yes, sir.
Q. Never moved from that seat?
A. I don't remember whether he moved from his seat or not.
210 Q. After Bob Boutwell got your brother to dance with his wife did he speak to anybody in that house?
A. I don't remember.
Q. You saw him get your brother to dance with his wife and then get his hat and go out, did he?
A. I don't remember.
Q. Did you see him?
A. I saw him leave the house.
Q. Did you see him get your brother to dance with his wife?
A. Yes, sir.
Q. You saw him go out of the door?
A. Yes, sir.
Q. Did he speak to anybody?
A. Not that I saw.
Q. If he had spoke to anybody would you have seen it?
A. I don't know.
Q. If he had spoken to Filmore you would have seen him?
A. I don't know; I did not see him speak to him?
Q. Don't you know whether he did or not?
A. No, sir.
Q. Have you got in your mind a distinct recollection of what Bob Boutwell done?
A. I have got in my mind that he got my brother to dance with his wife.
Q. How did you get that fixed in your mind?
A. Because I saw him.
211 Q. Hear your people talk about it?

A. Yes, sir.
Q. Heard your sister talk about it?
A. Yes, sir.
Q. Heard your brother talk about it?
A. Yes, sir.
Q. All talked about it over at home?
A. Yes, sir.
Q. You are a witness, and your brother and your father, your sister—all witnesses?
A. Yes, sir.
Q. You have talked it all over time and again?
A. Yes, sir.
Q. Tell this jury why you don't know whether Bob Boutwell spoke to Filmore as well as you know he spoke to your brother.
A. Because I did not see him.
Q. You did see him call your brother?
A. Yes, sir.
Q. You saw him go and get his hat?
A. Yes, sir.
Q. You saw him walk out?
A. Yes, sir.
Q. Did he speak to Filmore?
A. I did not see him.
Q. You were looking right at him all the time?
212 A. No, sir; I was not looking right at him all the time.
Q. Where was he when you was not looking at him?
A. I reckon he was there in the house.
Q. How long after he got your brother to dance with his wife before he went out of the house?
A. He went right straight out.
Q. Did he call your brother or go over to him?
A. He went to him.
Q. Did he whisper to him?
A. I don't know.
Q. You heard him?
A. I did not hear what he said.
Q. Did you not state that you heard him ask your brother to dance with his wife; have you not stated that?
A. I don't know.
Q. Did you not state to me that you heard him ask your brother to dance that set?
A. I don't remember.
Q. You don't know whether your brother danced with his wife or not?
A. I know he got my brother to dance with his wife; because my brother took his place.
Q. Your brother took his place; then he went away from his wife before your brother took his place?
A. I don't remember whether he went away before my brother
213 took his place or not.
Q. Have you not just stated that Boutwell went away from his wife over to your brother?

A. He went away; I don't know whether he went back or not.
Q. He left his wife before your brother went to her?
A. He went over to my brother before my brother went to his wife.
Q. What did he say to him?
A. I don't know.
Q. Did you not just state that he called your brother from over at the other end of the house to dance with his wife; have you not stated that since you were on the stand? Did you not state that he called your brother to dance with his wife; hain't that the first thing you stated?
A. I don't remember whether I did or not.
Q. Did he call him?
A. He went to him and got him to dance in his place.
Q. How do you know?
A. Because my brother taken his place.
Q. You did not hear him call to him to take his place?
A. No, sir.
Q. What did Boutwell do; you say he got his hat and went out of the south door; you can not tell whether he spoke to Filmore or not?
A. No, sir.
214 Q. You saw him get his hat and go out of the south door?
A. Yes, sir.
Q. Did he speak to Filmore as he went?
A. I don't know.
Q. Where was Filmore?
A. He was playing the fiddle.
Q. On what portion of the house?
A. On the west side.
Q. Which side did he get his hat on?
A. On the south side.
Q. He went out of the south door; did he ever go to Filmore?
A. I don't remember if he did.
Q. Who did you go home with?
A. My father.
Q. Was your father drunk or sober?
A. I don't know whether he was drunk or not.
Q. You was with him; don't you know?
A. I could not tell.
Q. If he was not drunk, was he drinking?
A. I don't know; I was not with him when he was taking it.
Q. I am asking you from his appearance; was your father calling anybody loud around there?
A. Yes, sir; he was calling John Ball.
Q. You have been talking to him about that, have you not?
A. No, sir.
215 Q. Did he not call for Bob Blunt to come and drive the wagon?
A. No, sir.
Q. Where was Bob Blunt?
A. I don't know; he was not there, I don't think.
Q. You was there?
A. Yes, sir.
Q. Will Angling and your sister was there?

A. Yes, sir.
Q. Did your father call for Bob Blunt?
A. I don't know; I never heard him; he called for John Ball.
Q. Where were you when he called for John Ball?
A. I was in the house.
Q. Was your father in the house?
A. No, sir.
Q. Was the dance broke up yet?
A. I don't know.
Q. Did old man Box dance any?
A. Yes, sir; he danced some.
Q. What set did he dance?
A. I don't remember.
Q. How long after he did dance until he started home?
A. I don't know when he went home.
Q. How many sets was danced after Box danced?
A. I don't remember.
Q. What is your best recollection about that?
A. I don't remember.
216 Q. What is your best recollection about how many sets were danced after Box danced?
A. 3 or 4.
Q. You are pretty sure of that?
A. Yes, sir.
Q. You think 3 or 4 sets was danced after Box danced?
A. Yes, sir.
Q. Who did he dance with?
A. I don't remember.
Q. He was an old gentleman?
A. Yes, sir.
Q. It is rather unusual for an old man like that to dance?
A. Yes, sir.
Q. Box did not dance but the one set?
A. I don't know.
Q. You can't remember who he danced with?
A. No, sir.
Q. You think 3 or 4 sets were danced after he danced?
A. Something near that.
Q. You know that there was more than one danced?
A. I think there was.
Q. Where was you when this case was tried before?
A. I was at home.
Q. Did you ever have any talk with Joe Cross about this case?
A. No, sir.
Q. Never talked with him in your life about this case?
A. No, sir.
217 Q. Never talked with anybody?
A. I have talked with my folks about it?
Q. Anyone else?
A. No, sir; not that I remember of.
Q. How long were you going home after you left Boutwell's house that night?

A. I don't remember.
Q. How did you travel?
A. I went in the wagon with my father.
Q. Did you travel slow?
A. Yes, sir; we walked.
Q. Walked all the time?
A. Yes, sir.
Q. Did Will Angling go with you all?
A. He went with my sister.
Q. Did he go before or behind the wagon?
A. I don't remember.
Q. Did you see him after you got home?
A. Yes, sir.
Q. How long did he stay there?
A. I don't know.
Q. Well, you saw him?
A. Yes, sir.
Q. What was he doing when you got there?
A. I don't remember.
Q. How far is it from Boutwell's to your house?
218 A. Something near a mile and a half.
Q. Where do you live—at home?
A. I live with Will Angling.
Q. Now, have you ever talked with him any about this case?
A. No, sir.
Q. Never did in your life?
A. Yes, sir; I have spoken to him about it.
Q. Did you ever tell anybody what you were going to swear in the case?
A. No, sir.
Q. Never have told anybody what you would swear at any time?
A. No, sir; I did not know I was going to be a witness.
Q. Since you have been a witness, have you told anybody?
A. No, sir.
Q. I understood you to say you had talked there about the case before you come down here among your relatives, about different parts of the case; it has been discussed there and talked there in the family, had it not?
A. Yes, sir.
Q. How old are you, Buddy?
A. I am 20.
Q. This occurred when you were about 14?
A. Yes, sir.
Q. You stated you did not know how many sets old man Box danced; whether he danced more than one set or not?
A. No, sir.

219 GEORGE WILLIAMS.

You know these defendants here, Bob Boutwell, John Ball, and Filmore Ball?
A. Yes, sir.
Q. Were you at a dance at Bob Boutwell's house on the 25th of June, 1889?

A. Yes, sir.
Q. Did you see old man Box at the dance?
A. Yes, sir.
Q. Did you see these defendants all there that night?
A. Yes, sir.
Q. Do you remember about the time the last set or the next to the last set was danced, about the time old man Box left there?
A. Yes, sir.
Q. Did he state he was going home? State if you saw anything of these defendants and what they did immediately after old man Box left to go home.
A. When old man Box left the house to go home a set got on the floor to dance. When the set got on the floor to dance—just after that Box left the room and said he was going home—I noticed Boutwell for one in the set; him and his wife was dancing together. Filmore was sitting behind him playing the fiddle; he reached up and tapped Boutwell on the back with the fiddle bow, and he turned around and stooped down as though to whisper something; he straightened up and walked across the room and asked Mr. Blunt to take his place, and Mr. Blunt took
220 his place on the floor. That was the last I saw of Boutwell that night.
Q. Did you see anything of John Ball before that?
A. He was there before that.
Q. Did you see anything of him about that time?
A. No, sir.
Q. Now, you say that after Boutwell had taken his place there Filmore struck him in the back with a fiddle bow, and they whispered something, and Bob Boutwell went over to Bob Blunt, and then Bob Blunt danced with Boutwell's wife and you saw Boutwell leave the room.
A. Yes, sir.
Q. That was the last you saw of Boutwell that night?
A. Yes, sir.
Q. How long now had old man Box been gone at the time you noticed this performance?
A. I could not state.
Q. About how long?
A. He had been gone some 10 or 15 minutes probably.
Q. You know whether he had stopped any length of time out there or not?
A. I don't know.
Q. What door did you see Bob Boutwell go out at?
A. At the south door.
Q. Who played the fiddle on after that for them to dance?
A. Filmore, for one.
221 Q. Did you see anything of John Hayes there that night after that?
A. No, sir.
Q. Him nor Bob Boutwell, neither one?
A. No, sir.
Q. You staid there until the dance broke up?
A. Yes, sir.

Cross-examination:

Q. You was not a witness at the examining trial?

A. No, sir.

Q. You state to the jury what side of the house the fiddlers was on at the time you saw Boutwell on the floor to dance?

A. He was on the west side.

Q. Now what side of the house was Boutwell, his partner, on?

A. On the west side.

Q. He was right close to the fiddlers then?

A. Yes, sir.

Q. You saw Boutwell go right from the fiddlers over to Blunt?

A. Yes, sir.

Q. Where was Blunt?

A. He was standing at the south door.

Q. Was that Tommy Blunt or Bob Blunt?

A. It was Bob.

Q. Was not Tommy at the south door and Bob in the northwest corner of the house?

A. No, sir.

222 Q. Then you saw Boutwell leave his wife and go to the south door to Bob Blunt?

A. Yes, sir.

Q. You are certain of that?

A. I am.

Q. You are certain he did not go across to the opposite corner to Blunt?

A. No, sir; he did not.

Q. You are as certain of that as you are that he went away from his wife?

A. Yes, sir.

Q. Where did he go to get his hat?

A. His hat was hanging by the door.

Q. Did he ever go back to his wife?

A. Not that I saw.

Q. He come to the door and got Bob Blunt to dance with his wife and got his hat and went out?

A. Yes, sir.

Q. Did you see anything of Tommy Blunt about that time?

A. I think Tommy was standing in the door; I think Tommy and Bob was standing there together.

Q. How far apart were they?

A. I could not state the distance, but they were close together.

Q. You say it is not a fact that Bob Boutwell walked across

223 to the other corner of the house to Bob Blunt?

A. No, sir; I don't think he did.

Q. Have you got any doubt about it?

A. I have.

Q. What created a doubt in your mind now?

A. I think he walked to the door and Bob was close, and he asked him to take his place.

Q. Are you certain Bob Boutwell did not walk from the other end of the house to Bob Blunt?

A. I could not state positively.

Q. Hain't it a fact that you have got an idea that someone told it differently, and that is what makes you get doubtful about it?

A. He might have been over in the other corner.

Q. What makes you doubtful now; what is it that makes you doubt whether he was at the south door or not?

A. I think he was.

Q. Do you know?

A. I know he was there about the door.

Q. Do you know that he was not over in the other corner of the house?

A. No, sir; he was not over there?

Q. Are you positive about that or not?

A. I am.

Q. You know that he was standing at the door very close to Tommy Blunt?

224 A. Yes, sir.

Q. How far from Tommy?

A. Something like 2 feet, I suppose.

Q. Did Bob Boutwell whisper to Bob Blunt?

A. I could not say whether he whispered or not.

Q. Did he say anything to him?

A. I don't know.

Q. How do you know he asked him to dance with his wife?

A. Because he danced with her.

Q. He left his partner and went to Bob Blunt. Did he say anything to Bob Blunt?

A. I don't know.

Q. He went by him and said nothing?

A. He stopped.

Q. Did he say anything to him?

A. I never heard him.

Q. Did you see him say anything to him?

A. No, sir.

Q. Just as quick as he did that he got his hat and went out?

A. Yes, sir.

Q. How far did he have to go to get his hat?

A. He stopped about the door and got his hat.

Q. Where was his hat hanging?

A. Right at the corner of the door.

Q. He went out. How far were you from Filmore and Bob Boutwell when you saw Filmore tap him on the back?

225 A. 8 or 10 feet.

Q. Haint it a fact that Bob Boutwell and his wife had their position on one side of the house and the fiddlers on the other?

A. No, sir.

Q. That haint so?

A. No, sir.

Q. You are certain of that?

A. I am.

Q. Have you ever been a witness before?
A. Yes, sir.
Q. When?
A. When they had the other trial.
Q. Your brother here?
A. Yes, sir.
Q. Did he dance in that set?
A. I could not say.
Q. You know any of them that danced in that set?
A. I know Bob Blunt danced.
Q. Don't you know every one of them people up there?
A. I know a good many.
Q. You knew all at that dance, did you not?
A. No, sir.
Q. Were you a stranger there?
A. There was a good many strangers there.
226 Q. Can you tell this jury anybody that danced in that set?
A. Bob Blunt danced in it for one.
Q. You know Bob danced?
A. Yes, sir.
Q. What kind of a dance did Bob dance, a round dance?
A. No, sir; it was a square dance.
Q. Did he dance it by himself?
A. He had a partner, Mrs. Boutwell.
Q. That all that danced?
A. No, sir.
Q. Can you tell anybody else that danced except them 2?
A. I don't know as I can.
Q. What impresses you with a distinct recollection of them 2 and nobody else there that night?
A. I could not state how it happened that I noticed them 2, but it is just that way.
Q. Have you ever talked about it since?
A. Very little.
Q. Now, you can not tell this jury any other name that danced that dance except these 2?
A. No, sir; I don't know.
Q. Have you got any idea how many danced that set; have you any recollection about that set?
A. 8 danced the set.
Q. You remember that, do you?
A. Yes, sir.
227 Q. Can you recollect the location of anybody else on the floor; what part of the house anybody else occupied; do you remember what portion of the wall any of them occupied except those 2?
A. If I knew who was in the set I could tell you.
Q. If Miss Blunt danced where did she stand?
A. I don't know.
Q. If Will Angling danced where did he stand?
A. I don't know.
Q. If John Ball was in that set where did he stand?

A. I don't know.
Q. I will ask you if you will swear to this jury that John Ball did not dance that very set?
A. I don't think he did.
Q. Will you swear that he did not dance that identical set?
A. I don't think he did.
Q. What about Angling?
A. I don't think he danced, either.
Q. You know Ashby?
A. Yes, sir.
Q. Did he dance?
A. I don't think he did.
Q. Who did dance?
A. I don't know.
Q. Did you know any other young man there that night?
A. Yes, sir.
228 Q. If you don't know who did dance, what makes you say that a certain fellow did not dance; what reason have you to say that a certain fellow did not dance when you say you know they were there and you don't know who did dance; can you give any reason for your statement?
A. No, sir; I don't know that I can.
Q. Hain't the only reason that you have got is, that you don't want to say John Ball danced that set; hain't that the only reason you have got?
A. No, sir.
Q. Was that the last set?
A. I believe it was.
Q. Was it or not?
A. I could not say positively.
Q. Did old man Box dance any set?
A. Yes, sir; he danced one.
Q. What set was that?
A. The set before he left.
Q. How many sets was danced after old man Box left there?
A. Not but one.
Q. How long after he left before they got that set organized?
A. Some 5 or 10 minutes.
Q. How long did that set last?
A. I could not say.
Q. How long did you stay there after the dance broke up?
A. Right smart bit.
229 Q. How long.
A. I could not say how long it was.
Q. Where did you go then?
A. I went home.
Q. Did you see old man Blunt there?
A. Yes, sir.
Q. Did you leave before he did or not?
A. I left afterwards.
Q. How long after?
A. I could not say.

Q. Who was with you?
A. My brother and another gentleman.
Q. Were you in the house after the dancers left?
A. Yes, sir.
Q. How long afterwards?
A. I could not state.
Q. Who was in there?
A. My brother and a man by the name of Keener Conley.
Q. That was all that was in there?
A. No, sir.
Q. Was James Weller there?
A. Yes, sir.
Q. Where was he at the time you saw Boutwell get his hat and do all of that you have been telling about?
A. I don't know.
230 Q. You did not see him?
A. Not that I recollect of.
Q. Who else helped play the fiddle besides Filmore Ball and John Hayes?
A. There was several that played.
Q. Where was the other fiddlers at this time?
A. I don't recollect.
Q. 2 played that set. How long since you had seen the other man that played the fiddle?
A. One had gone home, or he said he was going home.
Q. Was the fiddlers all gone but these 2?
A. Angling was there.
Q. Was he a fiddler?
A. He was.
Q. Where was he while that set was going on?
A. I don't know.
Q. How long since you had seen him?
A. Been right smart little bit.
Q. He was gone somewhere; you don't know where he was?
A. No, sir.

JOHN HAYES.

Do you know these defendants, John Ball, Filmore Ball, and Bob Boutwell?
A. Yes, sir.
Q. Did you know old man Box?
A. Yes, sir.
231 Q. Were you at Bob Boutwell's house on the 25th day of June, 1889?
A. Yes, sir.
Q. What were you doing there?
A. They had a dance there.
Q. Were you playing the fiddle there that night?
A. I played some.
Q. Who else played?
A. Filmore Ball, one of these defendants, Ed. Rice, and Sid Berney?
Q. You remember of seeing old man Box there that night?

A. Yes, sir.

Q. You remember about the time old man Box left there that night to go home?

A. I remember the time he went out of the house.

Q. What time was that?

A. It was between 1 and 3 o'clock.

Q. Now, about how long was it before the dance broke up?

A. I think there was 2, and maybe 3, sets danced after he left.

Q. You don't know how many?

A. No, sir.

Q. State now if you saw anything of these defendants here after Box left the house to go home that night, what they did, and all about it; explain it to the jury.

A. John came into the north door. Bob Boutwell was on the
232 floor to dance. He laid his hand on Bob Boutwell's shoulder and whispered something to him.

Q. John come in from what door?

A. From the north door. When he went out Filmore tapped Bob with his fiddle bow. Bob stooped over and they whispered something and Bob left the room.

Q. Went out of what door?

A. He went out of the south door.

Q. The same door that old man Box went out of?

A. Yes, sir.

Q. Who took his place on the floor?

A. Bob Blunt.

Q. How long was it after old man Box left the house before John come in the north door?

A. About 2 minutes.

Q. Did John have his hat on?

A. I don't recollect whether he did or not.

Q. Do you remember whether he had his hat on when he went out?

A. I don't recollect.

Q. How long did he stay in there after he talked with Bob Boutwell?

A. He walked in and whispered to him and walked out.

Q. How long was it from that time until you saw Filmore tap Bob Boutwell on the shoulder with his fiddle bow until he went out of
233 the door? Did you see anything more between Bob Boutwell and Filmore Ball after Filmore Ball tapped Bob Boutwell on the shoulder and he stooped over and they whispered something?

A. He left then and went out of the south door.

Q. Who took his place?

A. Bob Blunt.

Q. Did you see him speak to Bob Blunt?

A. No, sir.

Q. Did you see anything more of John Ball and Bob Boutwell that night?

A. No, sir.

Q. They were not in the room—did not dance any more that night?

A. No, sir.

Q. Where did you go when you left there that night?

A. I went down to Blunt's and went then to Kirkpatrick's, at Berneyville.

Q. You know how Box come to be there that night?

A. No, sir.

Q. You know who that party was given to?

A. No, sir.

Cross-examination:

Q. Dances are pretty common up in that country?

A. Yes, sir.

Q. Good many dances up around there; you fiddle for a good
234 many of them?

A. Yes, sir.

Q. Where did you go from to that country?

A. I come from Missouri.

Q. How long had you been up there?

A. About 2 years; may be 3.

Q. Box danced one set?

A. Yes, sir.

Q. There was 2 or 3 sets danced after he left?

A. Yes, sir.

Q. Now, was it 2 or 3?

A. I haint certain.

Q. You know it was as many as 2?

A. Yes, sir.

Q. You are pretty certain there was as many as 2 sets danced after he left, and possibly 3?

A. Yes, sir.

Q. You were a fiddler?

A. I played some.

Q. You fiddle for the last set?

A. Yes, sir.

Q. There was either 2 or 3 sets danced after Box left?

A. I think so.

Q. You saw him leave?

A. Yes, sir.

235 Q. What set was this on the floor when John came in at the north door—was that the last set?

A. No, sir; it was not the last set.

Q. Are you certain of that?

A. I don't think it was. I think there was 2 sets danced with the one on the floor, and maybe 3.

Q. You feel tolerably certain of that?

A. I think so.

Q. Your mind is as clear about that as the balance you testified about?

A. I think so.

Q. Then there was either 2 or 3 sets danced after that, counting that one; counting that, then, there would be 2 more?

A. Yes, sir.

Q. I will ask you if Bob Boutwell was not on the floor there the last set that was danced?

A. No, sir.

Q. You are positive of that?

A. Yes, sir.

Q. Are you as certain of that as you are that you saw him go out of the door?

A. Yes, sir.

Q. You are just as certain he was not on the floor the last set as you are that he went out of the door?

A. I think so.

236 Q. That you know?

A. Yes, sir.

Q. Now, then, when John Ball come in at the north door, everybody in the house could see him, could they not?

A. I don't know that everybody could; a good many could.

Q. Man standing against the wall could see him, could they not?

A. Well, there was a pretty big crowd there; there might be some one in the way.

Q. He come in the door and walked across the open place in the middle?

A. The door was not in the middle.

Q. I thought you stated he walked across to Bob Boutwell; Boutwell was on the east side with his wife?

A. Yes, sir.

Q. You are certain of that?

A. Yes.

Q. The fiddlers sit right behind where he stood; haint it a fact the fiddlers were sitting on the west side? Haint that a fact?

A. Yes, sir; it is a fact, because I was mistaken when I said they were on the east side.

Q. You are not mistaken about Bob Boutwell's house opening on the west, and a fireplace on the west side, and a plank put across the fireplace? You was over on that side with your fiddle?

A. Yes, sir.

237 Q. How close were you to Filmore Ball?

A. He was sitting next to me.

Q. Well, Bob Boutwell was standing with his wife, right close to you and Filmore; John come in and laid his arm on his shoulder and said something to him?

A. Yes, sir.

Q. Was there anything to prevent Tom Blunt and Williams from seeing him?

A. I don't know where they was.

Q. Suppose they had been standing just about the south door, could they have seen him from the south door?

A. I think they could.

Q. Could Bob Blunt have seen John when he come to take the place of Bob Boutwell?

A. I don't know.

Q. Would he not have been bound to see him?

A. He might have been looking the other way.

Q. Which way did John go after he tapped Bob Boutwell on the shoulder? You say John come in and tapped Boutwell on the shoulder and whispered something.

A. He turned around and went back.

Q. Out of the north door, or not?

A. Yes, sir.

Q. Did Bob Boutweli go across the house over in the corner and get Bob Blunt to come and dance with his wife?

238 A. I don't know; I never saw him go to Bob Blunt; I never saw him until he come on the floor.

Q. If Bob Boutwell went across the floor to get Bob Blunt to dance with his wife, did you not see them?

A. No, sir.

Q. Where did Bob Boutwell go when he left his wife?

A. Out of that door.

Q. Did he say anything to anybody?

A. I never noticed him saying anything to anybody.

Q. Where did Bob Blount come from when he come to dance with the wife of Boutwell?

A. He came in the south door.

Q. Did you see anything of Tommy Blunt?

A. I don't recollect about him.

Q. Did you see him that night?

A. Yes, sir.

Q. Did you ever see John Ball before that?

A. Yes, sir; I saw him at Berneyville.

Q. Did he dance any that night?

A. I don't recollect.

Q. Did you see any fellow dancing with the sole of his shoe loose flapping up and down on the floor?

A. No, sir.

Q. Don't you know John did dance that night?

A. I don't know.

Q. You tell this jury that John did not dance several sets that night?

239 A. I don't know; I never noticed.

Q. Did Filmore dance any?

A. I don't recollect.

Q. Did Bob Boutwell dance any set?

A. I don't recollect whether he danced any or not.

Q. Did Bill Angling dance any?

A. Yes, sir; I think he did.

Q. Did Bob Blunt dance any set but that one?

A. I don't recollect whether he did or not.

Q. How does it happen that you happen to know just about these particular matters and nothing else about what was done that night?

A. I just happened to see it.

Q. Are you related to Box?

A. Yes, sir.

Q. Who did you marry?

A. I married one of Box's daughters.

Q. You and Angling control the farm now?
A. Yes, sir.
Q. How do you say you went away from there that night?
A. I went in front of Blunt's wagon for apiece, then I went off and left them.
Q. What did you go off and leave them for?
A. Because I was riding horseback, and I went on.
Q. What relation are you to Blunt's?
A. He is my uncle.
240 Q. You married Box's daughter and Blunt is your uncle?
A. Yes, sir.
Q. Have you and Blunt ever talked this matter over?
A. We have talked about it several times.
Q. You were not a witness at the examining trial?
A. No, sir.
Q. Who did you first ever tell what you knew about John coming in and laying his hand on Boutwell's shoulder?
A. I don't recollect.
Q. When did you marry?
A. I married in Sept. after he was killed.
Q. Did you ever go down to Berneyville and try to get up a mob to mob Filmore Ball after he was acquitted in this case?
A. No, sir.
Q. You ever down there a talking about it?
A. Yes, sir.
Q. You tried to get up a mob, to', did you not?
A. No, sir.
Q. You are certain of that?
A. Yes, sir.
Q. You never said one word about what ought to be done with him?
A. I talked several times about what ought to be done, the way he was acting around there.
Q. You did not say on the morning after he got back from Paris
241 that you wanted him out of the way, that he bothered you?
A. No, sir; I don't know as I did.
Q. You are a good friend to him?
A. Me and him never had any trouble.
Q. You know how Boutwell was dressed that night?
A. No, sir.
Q. You know what sort of a hat he had on?
A. No, sir.
Q. You know whether he had on shoes or boots?
A. No, sir.
Q. You know how John Ball was dressed that night?
A. No, sir.
Q. You know whether he had on a sack coat or a frock coat?
A. I don't know.
Q. You know whether he had on boots or not?
A. I don't know.
Q. Was he in his short sleeves when he come into the house, or have his coat on?

A. I don't recollect.
Q. Did Bob Boutwell have on a coat?
A. I cannot tell you.
Q. You would not swear to the jury that they were not both in their shirt sleeves?
A. No, sir.
Q. You would not swear that they did not both have a frock coat on?
242 A. No, sir.
Q. Would you swear they did not have on an overcoat?
A. I am satisfied they did not have on an overcoat.
Q. Why are you satisfied of it?
A. Because it was not right time of year for it.
Q. So far as you know outside of the time of year he had it on?
A. If he had had on an overcoat I would have noticed it.
Q. If he had been around in his shirt sleeves at a dance you reckon you would have noticed it?
A. I don't know.
Q. Would you swear that he was not in shirt sleeves with a belt to hold his pants up?
A. No, sir; I would not swear that.
Q. Would you swear that he was barefooted or have on shoes or boots?
A. I think he had on shoes or boots.
Q. Would you swear that he did not have on slippers?
A. Yes, sir.
Q. Did he have on that sort of shoe or boot?
A. No, sir.
Q. Have you any idea what he did have on?
A. I don't know whether he had boots or shoes on.
Q. Did he have spurs on?
A. I did not see any.
243 Q. Filmore had a place up on Mud Creek, did he not?
A. I think he bought one up there some little time before this happened.
Q. You don't know anything about it only just what you heard?
A. No, sir.
Q. You did not have a bill of sale taken for it and recorded?
A. I had it taken after he was taken off down here.
Q. What did you do with it?
A. Lucy Ball has got it.
Q. What had you to do with it?
A. She sent me to have this taken.
Q. What did you have done?
A. I had it recorded in Lucy Ball's name.
Q. You was not her brother-in-law, then, was you?
A. Yes, sir; I was married then.
Q. You had got married; then you got a bill of sale to Filmore's place?
A. She paid the last payment and got the bill of sale given over to her. I took it and had it recorded.
Q. She paid $50, did she not?
A. She paid the last payment; I could not say what it was.

Q. There was about 2,500 acres in Filmore's place, was there not?
A. I don't know; I never saw it.
Q. What does the bill of sale call for?
A. Between 1,800 and 2,500 acres. I have heard it is a pretty good place.
244 Q. Filmore had that place and paid for most of it before ever Box was killed, did he not?
A. I don't know.
Q. What did his wife pay on it?
A. I don't know.
Q. Did she not pay it out of Filmore's property?
A. I don't know.
Q. Do you know who she paid it to?
A. To Mr. Beaufort, I think.
Q. You were talking last night about having a bill of sale recorded in the name of Mrs. Angling it is now.
A. Yes, sir.
Q. Mrs. Ball then.
A. Yes, sir.
Q. Where did you have that recorded at?
A. At Ardmore.
Q. How far is Filmore's farm on Mud Creek from the Box farm?
A. I never saw it. They say it is about 25 or 30 miles.
Q. What is your feelings towards these defendants?
A. I have no feeling towards them particularly.
Q. You remember when Filmore was acquitted and come back home?
A. Yes, sir.
Q. You know R. R. Cheek?
A. Yes, sir.
245 Q. I will ask you if you did not go to R. R. Cheek to get him to go with you to get up a mob either to kill Filmore or run him out of the country?
A. I don't think so.
Q. Did you, or did you not?
A. Not that I recollect of.
Q. If you had done such a thing, would you have remembered it?
A. Yes, sir.
Q. You swear to this jury that you never went to R. R. Cheek or had any talk of that sort?
A. I don't remember.
Q. You certain you did not talk around in the country about it?
A. I think not.
Q. You are certain, now?
A. Yes, sir.
Q. Why were you not certain when I first asked you?
A. Because I never talked to anybody around there about it.
Q. You were one of the fiddlers that night?
A. Yes, sir.
Q. Sit by Filmore when he played?
A. Yes, sir.

Q. I will ask you if you don't know that that night he had boots on and had his breeches stuck in his boots?

A. I don't know.

Q. Do you say he did not?

A. I could not say.

Q. You hain't got any idea what he had on his feet?

A. No, sir.

246 Q. Did John dance any that night?

A. I don't recollect whether he did or not.

Q. Did Filmore dance any?

A. I don't recollect.

Q. Did you dance any?

A. Yes, sir.

Q. You haven't any idea, then, what Filmore had on his feet, whether shoes or boots?

A. No, sir.

Q. Your attention was not called to it in any way?

A. No, sir.

Q. To John either?

A. No, sir.

Q. Did you see them boots they had in here?

A. No, sir; I seen John's boots when they were brought out of the house.

Q. If John had had on them boots that night with a cut in the top and the sole loose on the bottom, don't you think you would have noticed it?

A. I might and I might not.

Q. Was you there when the arrest was made?

A. I was not.

Q. Were you with the party when they started?

A. Yes, sir.

Q. Where did they start from?

247 A. They started from the southeast corner of the farm, part of them started from Berneyville.

Q. Where did Hec Thomas start from?

A. They come into the road with us between Berneyville and Box's farm.

Q. Where did you go?

A. We went on to Box's farm.

Q. What part of the Box farm?

A. The southeast corner of it.

Q. You went over to the well, the well was there, you never went to the Box house, then?

A. No, sir.

Q. Hec Thomas just come in with the first crowd?

A. Yes, sir.

Q. You went to the well, and right then and there Hec started out to arrest these boys?

A. Yes, sir.

Q. He never went to see the tracks before he started parties out to make the arrest. Did he ever see the tracks?

A. I think not.

Q. Don't you know he did not?

A. I don't think he went to see any tracks, because it was not more than 20 minutes. Just as soon as he got there he started out to arrest them.

248 Q. He started to arrest these boys before ever he saw a track. Did anybody have any measures there of any shoes at any time?

A. I never saw any there.

Q. Where did you see measures?

A. At John's house, after they were arrested.

Q. Did you see measures applied to Filmore's shoes?

A. I did not.

Q. Did you see them applied to John's boots?

A. No, sir.

Q. Who took the measures?

A. I hain't certain; either Frost or Ed. Berney.

Q. If they had the measures taked to the shoes and boots, why did they not try them?

A. I don't know whether they measured them or not.

Q. You was there and heard them talk; did you see any measuring in your presence?

A. No, sir.

Q. Hain't it a fact that they put these boys under arrest and then took the boots and shoes and went off to measure tracks, and never intimated to these defendants or their friends whether the tracks fit or not, or anything about it?

A. They took the boots and shoes, and went off and measured the tracks.

Q. Who was it that went off to measure tracks?

A. Hec. Thomas was one, Joe Cross another; I hain't certain whether Ed. Berney was along or not; and John Horn.

249 Q. Did they claim in the presence of these defendants that the shoes and boots fit those tracks?

A. I don't know.

Q. Did they not keep it an absolute secret from these defendants that they had ever measured these tracks at all, until after the tracks were gone?

A. I don't know.

Q. Did these defendants have an opportunity to go and see whether these boots and shoes fit these tracks or not?

A. No, sir.

Q. Did you hear anybody claim in their presence that their shoes and boots fit those tracks?

A. Not that I know of.

Redirect:

Q. You was asked about R. R. Cheek; he is a brother-in-law of Bob Boutwell's?

A. Yes, sir.

Q. You was questioned about Filmore dancing; do you know whether he danced around on the floor by himself or not?

A. He did after the dance broke up.

Q. When Bob Boutwell went out of the door and you missed him, what did Filmore do then?

A. He started to put a string on his fiddle and got up and went out.

Q. Went out where?

250 A. Went out of the north door.

Q. The same door that John went out at?

A. Yes, sir.

Q. How long was it after Bob Boutwell had gone out of the south door before you saw Filmore go out of the north door?

A. One or two minutes.

Q. How long then until you next saw Filmore?

A. 3 or 4 minutes.

Q. Where did you see him then?

A. He come in the house, strung up his fiddle, and went to playing.

Q. What did he do then?

A. He threw out his feet and tripped some that were dancing.

Q. Did you notice him trip any ladies?

A. Yes, sir; he tripped either Nanney Blunt or Emma Box, I don't know which.

Q. You noticed him doing anything about the hats there?

A. Yes, sir; he took Nanney Blunt's hat off and begged them to stay longer.

Q. He seemed to be opposed to the ball breaking up and wanted them to stay and dance longer?

A. Yes, sir.

Q. He seemed to be jolly?

A. Yes, sir.

Q. When you say Filmore went out was John in the house at that time?

251 A. No, sir; he went out before.

Q. Bob Boutwell was out, all 3 was out together?

A. Yes, sir.

Q. You say Filmore returned in 3 or 4 minutes?

A. Yes, sir; he commenced fixing the string on his fiddle.

Q. You testified in this case before, have you not?

A. Yes, sir.

Recross:

Q. You people were trying to find out everything you could about who done this killing up there after these parties were arrested and before?

A. Yes, sir.

Q. You were all trying to find out who did the killing after and before they were taken off?

A. No, sir; I had nothing to do with it at all until the morning that the arrest was made; I was sent for to come down there.

Q. Who sent for you?

A. I think Ed. Berney and Joe Cross.

Q. You knew just as much then as you know now?

A. I suppose so.

Q. Right on the start, before the arrest was made, you was sent for by Ed. Berney and Joe Cross?

A. Yes, sir.

Q. You were not a witness at the examining trial?

A. No, sir.

252 Q. You know why?
A. No, sir.
Q. Where were you at at that time?
A. I was working at Kirkpatrick's, at Berneyville?
Q. You saw Filmore dancing around and insisting on them not breaking up yet?
A. Yes, sir.
Q. When he did this insisting on them dancing longer and not breaking up, they were about to break up, were they?
A. Yes, sir.
Q. How long had Box been gone home then?
A. I could not say exactly; I think one or two sets had been danced.
Q. Between the time Filmore done the tripping and cutting up and the time Box left two or 3 sets were danced?
A. One or 2, may be 3.
Q. Was it the last set that you speak about him wanting them to stay longer?
A. I could not say whether it was the last one or not.
Q. You think they had danced 2 or 3 sets after Box left before this occurred?
A. One or two or 3.
Q. You say when John came in and laid his arm on Boutwell's shoulder and went out, Filmore got up and went out of the north door?
A. Yes, sir.
253 Q. After Bob went out, they was not dancing then?
A. No, sir.
Q. Then it hain't a fact that they were dancing right away after Boutwell went out?
A. No, sir.
Q. Filmore had gone out and was gone some time and come back and fixed his fiddle string before the dancing commenced?
A. Yes, sir.
Q. Was there anything to prevent Tommy or Bob Blunt or Williams from seeing Filmore go out?
A. No, sir; I think not.
Q. He was gone 3 or 4 minutes and come back, wound his fiddle string, and then commenced dancing?
A. Yes, sir.
Q. Bob Blunt and Mrs. Boutwell standing there all the time?
A. Yes, sir.
Q. Now, from the time Bob Boutwell went out until Filmore come back and got his string fixed and commenced playing was how long?
A. 5 or 6 minutes.
Q. How much of that time do you think it took him to fix his fiddle string?
A. Probably one minute or so.
Q. The dancing actually stopped for Boutwell and the 2 Balls to go out a while?
A. Yes, sir.
254 Q. You are certain about that?
A. Yes, sir.

Q. The dancing had all stopped until some minutes afterwards he come back and fixed his fiddle string, and Bob Blunt and Mrs. Boutwell was standing right almost touching you fiddlers on the west side of the house?
A. Yes, sir.
Q. Where did Bob Blunt come from?
A. From the south door.
Q. Did you see Tommy Blunt?
A. I did not.
Q. He completed the fixing of the fiddle string after he come back into the house?
A. Yes, sir.

NANNY BLUNT.

You live in Chickasaw Nation, I. T.?
A. Yes, sir.
Q. You know these defendants, John Ball, Filmore Ball, and Bob Boutwell?
A. Yes, sir.
Q. Were you at a party at Bob Boutwell's on the 25th of June, 1889?
A. Yes, sir.
Q. Who did you go to the party with?
A. With Mr. Angling.
255 Q. Who did you go home with?
A. Mr. Angling.
Q. Did you see these defendants there that night?
A. Yes, sir.
Q. Who invited you to the dance?
A. They come to the field and invited us all.
Q. Who come to the field and invited you?
A. John Ball and Bob Boutwell.
Q. 2 of them come and invited you; went around inviting different ones?
A. They invited everybody, I guess.
Q. Big crowd there?
A. Yes, sir.
Q. About what time did the ball break up that night?
A. About 3 o'clock, I guess.
Q. Did you see old man Box there?
A. Yes, sir.
Q. Just before the party broke up did you notice anything of Bob Boutwell and John Ball?
A. They was there on the last set.
Q. What become of them; do you know?
A. No, sir.
Q. Where did you see them?
A. Bob Boutwell was in the room. He started to dance a set with his wife.
256 Q. Were you dancing in that same set?
A. Yes, sir.
Q. Did he dance the set?
A. No, sir.
Q. What become of him?
A. I don't know.

Q. Who danced the set in his place?
A. My brother Bob.
Q. Where did Bob Boutwell go?
A. I don't know.
Q. Did he leave the house?
A. I never saw him any more.
Q. Did you see him any more that night?
A. No, sir.
Q. See John Ball any more?
A. No, sir.
Q. Did you hear any shooting that night?
A. Yes, sir.
Q. What direction did you hear it in?
A. In the direction of Box's.
Q. Where was you at?
A. I was in the south door.
Q. Who else was there?
A. I was and a young man by the name of Keener Conley.
Q. Any one else?
A. There was several dancing.
257 Q. Was your place near the south door?
A. No, sir
Q. How did you come to be in that door then?
A. We were dancing a figure called grand right and left; in changing the dance you have to remain there a few minutes and we was swinging around there.
Q. You remember of hearing a gun fired as you was passing the south door?
A. Yes, sir.
Q. You remember of anyone else being near the south door besides Keener Conley and yourself?
A. No, sir.
Q. Was your brother Tommy Blunt there that night?
A. Yes, sir.
Q. You know where he was at that time?
A. No, sir.
Q. What kind of report did this gun make?
A. It made a loud report.
Q. How long was that now after you missed Bob Boutwell?
A. I don't know how long.
Q. You know about how long it was?
A. No, sir.
Q. Did you finish the set?
A. Yes, sir.
Q. Was that the set that your brother was dancing in at that time?
258 A. Yes, sir.
Q. You heard the gun?
A. Yes, sir.
Q. You had been dancing sometime there in that set?
A. Yes, sir.

Q. How many figures had you danced, do you know?
A. No, sir.
Q. That is what is termed a quadrille that you were dancing?
A. Yes, sir.
Q. How many couples were in that set?
A. 4.
Q. How many different sets were there danced on the floor?
A. Just one.
Q. Had they been running double sets there?
A. No, sir.
Q. Did they double on the sides on the sets?
A. I don't remember.
Q. Do you remember whether they had been doing it during the night?
A. I don't know, but they did not that set.
Q. Who else was dancing in that set besides you; and you say your brother was dancing with Bob Boutwell's wife—you remember who else was dancing?
A. No, sir; I do not.
Q. You remember any other parties that was dancing in that set?
259 A. No, sir; I don't remember.
Q. Did you see old man Box when he left there that night?
A. No, sir.
Q. You know Mrs. Frazier?
A. Yes, sir.
Q. Was she there that night?
A. Yes, sir.
Q. You know whether some of the parties had begun to leave during that set, some that had been attending the dance beginning to go home?
A. Yes, sir.
Q. After you had missed Bob Boutwell from that set there, did you see Filmore there?
A. Yes, sir.
Q. What did he do there that night; stste what was his actions?
A. He played the fiddle and danced around there and tried to get us to stay longer and dance on; we was fixing to go home when that set was out and he wanted us to stay and dance on.
Q. State if he said anything else?
A. He jerked my hat off and tried to get me to stay longer.
Q. Did you notice whether he was trying to trip anyone?
A. If he did I never noticed it.
Q. You know of another young lady that was tripped by him?
A. No, sir.
Q. You say he was dancing around on the floor by himself?
A. Yes, sir.
260 Q. He had the fiddle in his hands and was dancing around by himself and trying to get you all to stay longer?
A. Yes, sir.
Q. You did not testify in the examining trial in this case, did you? You were not a witness before Mr. Kirkpatrick in the examining trial in the case before Judge Bowman?
A. Yes, sir.

Q. You was not a witness in the examining trial, was you?
A. No, sir.
Q. Angling carried you down home to your father's house?
A. Yes, sir.
Q. Did you all go by John Ball's house in going down there?
A. Yes, sir.
Q. Did you notice anybody in his house?
A. No, sir.
Q. The house was closed up and dark; no light there?
A. No, sir; there was no light there.

Cross-examination:

Q. As you started home that night, did you pass anybody on the road?
A. If we did, I don't remember it.
Q. Several parties went down that way?
A. Yes, sir.
Q. You don't know whether those that went that way were behind or before you?
A. Yes, sir.
261 Q. You remember a wagon just ahead of you and some horse back?
A. No, sir; I don't remember it.
Q. You spoke of the time that Bob Boutwell was on the floor with his wife to dance and your brother dancing that set; where was your brother standing when he went to Mrs. Boutwell?
A. I don't know; the first time I saw him he was in his place.
Q. You say there was 4 couple on the floor at that time?
A. Yes, sir.
Q. Could you be mistaken; was there not 8 on the floor?
A. No, sir.
Q. You know you are not mistaken?
A. No, sir.
Q. There was only 4 couple?
A. Yes, sir.
Q. Did you see Boutwell leave his wife and go out of the house?
A. No, sir.
Q. Did you ever see where he went?
A. No, sir; the first I saw of him I saw my brother in his place; I had seen him on the floor just before that with his wife.
Q. About that time did you see anything of John Ball?
A. No, sir.
Q. Did not John walk in at the north door and walk up to Bob Boutwell?
A. If he did I did not notice him.
262 Q. Who played the fiddle for that set?
A. Filmore Ball.
Q. Where was he sitting, on the south side of the house?
A. No, sir; on the west side.
Q. How long after Boutwell went out before that set commenced?
A. I could not tell you how long.
Q. You saw Filmore sitting there?
A. Yes, sir.

Q. Did he stay there until the set commenced?
A. Yes, sir; he staid there until they danced that set.
Q. You are certain he did not get up and go out?
A. I could not tell; I did not see him if he went out.
Q. I will ask you if you did not wait for him to come back for the music; he had gone out; you have no recollection of waiting 5 or 6 minutes for music for Filmore to come back and play?
A. I don't recollect it.
Q. Who did you dance with?
A. I have forgot who I danced with.
Q. You remember who Mrs. Boutwell and your brother danced with, but you can't remember who danced with yourself?
A. No, sir.
Q. You remember who else was on the floor?
A. No, sir.
Q. How is it you can remember who Mrs. Boutwell danced with and not yourself? Who danced with you?
263 A. I would not have remembered that if my brother had not taken his place.
Q. You was watching Mrs. Boutwell close, then, to see who she danced with?
A. No, sir.
Q. What caused you to watch Boutwell so close that night?
A. I was not watching him.
Q. How do you remember who he danced with and all his movements, and you don't know who danced with yourself?
A. I was not paying any attention to him.
Q. You know what he done and what his wife done, and about your brother taking his place, yet you can not tell who danced with you?
A. No, sir; I just remember about my brother taking his place.
Q. Anybody else dance that set besides you and your brother and Mrs. Boutwell that you remember of?
A. No, sir.
Q. You haven't got any idea who they were?
A. I remember Keeney Conley was dancing.
Q. The balance of the crowd you don't know where they were or who danced?
A. No, sir.
Q. You remember about Filmore playing for that set?
A. Yes, sir.
Q. You remember about Boutwell coming on the floor with his
264 wife and your brother taking his place?
A. Yes, sir.
Q. You have no idea who you danced with that set?
A. No, sir.
Q. You did not see your brother Tom there?
A. I did not see him then.
Q. You say Filmore never tried to trip you up that night?
A. No, sir; if he did I never noticed it.
Q. Now, after that set was over, he asked you all to stay longer; I will ask you now if it is anything unusual at one of those dances for some to want to stay longer?

A. Sometimes they don't care about it, and sometimes they want us to stay longer.

Q. Sometimes they grab off the girls' hats?

A. Yes, sir.

Q. Nothing unusual for it to break up that way?

A. They don't have any certain way to break up the parties.

Q. You was swinging somebody about the south door, and heard a gun fired; who was you swinging?

A. Keeney Conley.

Q. How do you remember you was swinging Keeney Conley?

A. Because he said he heard a gun fired. I says, where? He said he did not know.

Q. Was that how you come to hear it?

A. No, sir; I heard it.

265 Q. How long had you been dancing then?

A. I could not tell you.

Q. Was you dancing pretty lively?

A. Yes, sir.

Q. Just as you swung at the south door a young man said he heard a gun fire?

A. Yes, sir.

Q. You was swinging just as hard as you could; right in the dance he says he heard a gun fired?

A. Yes, sir.

Q. Hain't it a common thing for somebody to be shooting around there, so common that you rarely ever notice when they do shoot?

A. It sounded like it was close; I never paid no attention.

Q. How close?

A. I don't know.

Q. Just as you and him was here at the south door the young man says a gun fired and you heard it?

A. Yes, sir.

Q. How do you reckon it happened to attract your attention just then?

A. I could not imagine.

Q. You did not hear but one?

A. No, sir.

Q. How long before you started home then?

A. Not so very long.

266 Q. You danced that set on out, then you started home?

A. Yes, sir.

Q. Did you and Angling start before the wagon did?

A. The wagon started first.

Q. How long did Angling stay when he got down to your house?

A. Not so very long.

Q. About how long?

A. 15 or 20 minutes.

Q. Did you talk to him just before you left?

A. Yes, sir.

Q. Where was you at?

A. I was in the house.

Q. He was in there?

A. Yes, sir.
Q. Where were the balance of the family?
A. They were in the house.
Q. He was talking with the family?
A. Yes, sir.
Q. What talking he done was in the house with the family; he was not out on the outside gallery talking to your father?
A. No, sir.
Q. He was in the house?
A. Yes, sir.
Q. He told you good-bye in the house?
A. Yes, sir.
267 Q. You are certain th't he said good-bye to all of you in the house and then left?
A. Yes, sir.
Q. What relation are you to Hayes?
A. I am a cousin.
Q. Your father is his uncle?
A. Yes, sir.
Q. Where do you all live at?
A. At Heeldon.
Q. You are not living now where you were then?
A. No, sir.
Q. Whose place did you live on at the time this occurred?
A. On Joe Cross' place.
Q. Has your brother Tom been at home all the time since this occurred?
A. No, sir; he has been at Berneyville.
Q. He has lived in that home neighborhood all the time?
A. Yes, sir.
Q. Have you talked to anybody about this case?
A. Yes, sir; I have talked to everybody that talked to me about it.
Q. Have you talked to your brother Tom about it?
A. No, sir.
Q. Have you ever talked to Bob about it?
A. No, sir.
268 Q. You have talked to everybody about it but Bob?
Q. He never talked to me about it; I have talked to my father about it.
Q. Have you ever talked with Cross or Berney about it?
A. Yes, sir.
Q. Have you talked with Hayes?
A. No, sir.
Q. You have talked to Berney and Cross and your father about it?
A. I have never talked to Berney about it.
Q. You remember distinctly about Angling leaving your house and telling you all good bye, in the house?
A. Yes, sir.

Redirect:

Q. There was a good many at the dance that night?
A. Yes, sir.
Q. Neighbors from all around?

A. Yes, sir.

Q. During the intervals when you were not dancing you were laughing and talking and going on very much?

A. Yes, sir.

Q. You were not dancing all the time from the time you got there until you stopped; you stopped at intervals?

A. Yes, sir; we would stop a half an hour in forming a new set.

Q. You were not watching out for the fiddlers, then, were you?

A. No, sir.

269 Q. You was paying attention to your partner?

A. Yes, sir.

Q. When the music begun you had somebody to do the calling; you know who had been calling there before that?

A. My brother Tom called some.

Q. You know whether Bob Boutwell had been calling some?

A. I don't remember.

Q. You say you have talked about this case; have you ever tried to keep it any secret?

A. No, sir.

Q. You testified on the trial of this case once before?

A. Yes, sir.

Q. Angling went there and told you all good night; you all were in the house when he said good night?

A. Yes, sir.

Q. You don't know whether he talked with your father there, some little time afterwards?

A. If he did he talked before us all.

Q. He never took him out to talk to him?

A. If he talked to my father I don't remember it.

Q. It has been 4 or 5 years since this occurred?

A. Yes, sir.

Q. Your father was there?

A. Yes, sir.

Q. He could have talked with him and you not recollect it?

270 A. If he did I don't remember it.

Q. You and him were not talking any secrets there?

A. No, sir.

Q. Talked to any of them that was there?

A. Yes, sir.

Q. Did Frazier live on the road that you all lived on?

A. No, sir.

Q. You don't know where Tom was at the time of the shooting?

A. No, sir.

Q. You know that he was at the dance that night?

A. Yes, sir; he was there.

* * * * * * *

337 OLD MAN BLUNT.

Did you know the gun that John Ball had at the time he was arrested?

A. Yes, sir; I used to own it.

Q. You used to own that double-barrelled shotgun, the gun brought down here?

A. Yes, sir.

Q. State if you are familiar with the shooting of that gun?

A. Yes, sir; I shot it many a time.

Q. How was it in regard to shooting buckshot, as to whether the shot would keep close together or scatter?

A. No, sir; they would scatter.

Q. Shot at a distance of 15 or 20 feet, would it scatter?

A. Yes, sir; scatter so you could not hit nothing with it.

Cross-examination:

Q. You shot that gun a good deal?

A. Yes, sir.

Q. Is that the gun they had in here?

A. Yes, sir.

338 Q. Where did you get that gun from?

A. I bought it from an Indian.

Q. Did Nelson Jones ever own that gun?

A. I don't know.

Q. Did you not understand that he once owned that gun?

A. I don't know.

Q. Where did the Indian say he got it?

A. I never asked him, I just traded for it.

Q. Suppose you were shooting about 10 or 12 feet with that gun loaded with buckshot, how big a circle would it shoot them over?

A. I never shot 10 or 12 feet with buckshot.

Q. Suppose you shot them 25 feet, would it scatter them one foot apart?

A. I reckon so, I have shot at trees and missed the whole tree.

Q. You have had that gun and had it loaded with buckshot, and shot at a big tree and missed the tree, clear?

A. Yes, sir.

Q. Are you a good shot?

A. Yes, sir.

Q. When you was a good shot, you had that gun loaded with buckshot and shot at a big tree, and that gun scattered so bad that it would actually miss a tree?

A. Yes, sir.

Q. You say shot *shot* 25 feet would scatter it perhaps over one foot? How did you load it when it done that?

A. Just put in a common load.

339 Q. It scattered bad?

A. Yes, sir.

Q. Now hain't it a fact the first time that you ever found out how bad it scattered was last term of the court when I got after them about them shot scattering so bad on the body of the dead man?

A. Yes, sir; you got after us about it scattering.

Q. How would it do if you put small shot in it?

A. If you put squirrel shot in it it would all go in a wad.

Q. But when you put buckshot in it they would scatter all over in every direction as soon as they left the gun, that is your experience with it?

A. Yes, sir.

Mrs. Ryder.

Do you know these defendants, Bob Boutwell, John Ball, and Filmore Ball?

A. Yes, sir.

Q. You knew Wm. Box, did you?

A. Yes, sir.

Q. Where were you living at on the 25th of June, 1889?

A. In Chickasaw Nation, I. T.

Q. Near Mr. Box?

A. Yes, sir.

Q. How far from Box's house?

A. A little over a half a mile.

340 Q. Are you any relation to any of these defendants?

A. John Ball is my son-in-law.

Q. Were you at the dance at Bob Boutwell's the right that old man Box was killed?

A. I went but did not stay.

Q. Who invited you down there?

A. Nanney Boutwell.

Q. Did you see anything of these defendants, Bob Boutwell, John Ball, and Filmore Ball?

A. Yes, sir.

Q. Did you hear them say anything about this killing before Box was killed or after he was killed?

A. Not John Ball or Bob Boutwell; I never heard them say anything.

Q. Hear Filmore say anything about it?

Counsel for defendants. We object to anything Filmore said as against any of the defendants except him.

The Court. Of course it would only be evidence against Filmore if he said anything.

Q. Did you ever hear these defendants or any of them have any conversation with them in regard to Box at any time before Box was killed? If so, when and where was it?

A. None only, except Filmore stopped in my house the Sunday evening before the killing.

341 Q. What did he stop for?

A. He just stopped in the door and said he would not be a bit surprised for him or old man Box one to be found dead at any time.

Q. Ever say anything else in regard to the case?

A. No, sir, nothing about the killing before that.

Q. Tell what you know about the case; you was here and testified on the former trial of the case?

A. Yes, sir.

Q. Tell what you know in regard to the case.

A. When he come there Sunday evening he just said that he would not be surprised at any time to hear.

Q. You spoke about that; anything else?

A. I have heard him say several times that if the old man was killed while he was on the place that he would stay there, or that he would hold it.

Q. What did he say about him being killed?

A. He said that if he was ever killed while he was on there that he would hold the place.

Q. How did he come to say anything about him being killed?

A. He did not say anything about him being killed; he said if he was ever killed while he was on the place he would hold it.

Q. Did you hear him say anything before that at any time; is that all you ever heard Filmore say before the killing?

A. Yes, sir.

Q. Say anything after the killing?

342 A. Only what he told me on the morning of the 27th; he told me that they was going to arrest him; that he did not care; that he could prove out of it.

Q. What was that he said?

A. He said on the morning of the 27th that they was going to arrest him that morning; that he did not care if they did, he could prove out of it; that there was 2 men that laid all night with him that could prove where he was; that they could not prove anything against him, and that they never would dream of John Ball and Bob Boutwell doing such a thing; that they would take him and try him and could not prove anything against him, and they would turn him loose.

Q. Go ahead.

A. He said he did not see what they was tracking around for; that they could not make nothing out of tracks; that he was perfectly satisfied that the tracks would just exactly fit John and Bob, but so far as his tracks were concerned he was not at all afraid of it; he said that he did not see why Joe Cross and Ed. Berney was dishing in so deep for; that it was none of their business; that if it had not been for Joe Cross and Ed. Berney they would not have said anything about it, and they would not have been bothered. Then he asked me about how many shots they got out of the old man; I told him; he said he shot the other load at some chickens and loaded the gun with fresh shot, and he wanted to

343 know if I thought they would still think John's gun killed the old man; he said they was going to lay it off on an old lady there.

Q. What did he say about the other track?

A. He said that there was more than one foot that made a big track; that Huse Graves' track would just fit the big track. Then he told me if he could he would call the old man back this morning as quick as he ever did anything in his life. I told him it was too late. Then he asked me if I noticed everybody down there eyeing him and watching him.

A. I told him I did not; but I did see them. He asked me if I thought he looked bad. I told him that I did not. Then he said he saw everybody there eyeing him all the time.

Q. Anything else said; if so, what was it?

A. He told me over a time or two about Berney and Cross tracking around there, and said if it had not been for Joe Cross and Ed Berney tracking around so much they would not have been bothered. He said his track would fit 2 or 3—Will Angling, Wat Cornish, and Bob Blunt—2 or 3 between here and the river. As far as his track was concerned, he was not at all afraid; that he could find as much as 4 or 5 that would fit

his track; that Bob Blunt, Will Angling, Wat Cornish, and 2 or 3 more between here and the river would fit his track.

Q. If he made any other statement at any other time, state what it was. Did he ever say anything to you about coming down here and testifying?

344 A. John wanted to know what I was going to come and swear. I told him I did not know.

Q. What did he say to you?

A. He said it would not be good for them that did do it.

Q. Do what?

A. Come down and tell things on him.

Q. Testify against him?

A. Yes, sir.

Q. When was that he made that statement?

A. 3 weeks ago last Monday.

Q. John Ball made that statement?

A. Yes, sir.

Q. Who was he talking to?

A. To me.

Q. Did he know that you was a witness here?

A. Yes, sir.

Q. What did he say to you?

A. He wanted to know what I was going to tell. I told him I did not know; that they did not ask me anything. He said it was strange I was coming and did not know what I was coming for. He said they would know when I went on the stand what I was going to tell, and it would not be good for them that did come down here and tell things on them.

Q. You remember of Filmore being up at your house a few days before old man Box was killed?

345 A. He was there Sunday evening, the 23rd.

Q. Anything said about being restless that night?

A. He said he could not sleep nights. He dreamed all kinds of dreams and seen all kinds of haunts, and spoke about some tracks that he had seen.

Q. Was anything said there about anybody going to be killed, do you remember?

A. None; only just he spoke that he would not be a bit surprised for him or the old man to be found dead at any time.

Q. Did you hear anything said between these defendants and your husband relative to contributing? Do you know anything about what was said between your husband and the defendants here in regard to helping to pay them out?

A. Filmore come to see him to see if he would throw in.

Q. What was said between them?

A. He said he would see them as far in hell as a pigeon could fly before he would see him out, or before he would throw in a cent. I think that is what he said.

Cross-examination:

Q. Where do you live?

A. I live about 4 miles north of Berneyville.

Q. On what farm?

A. On the Box farm?

Q. Who is your husband renting under?

A. Will Angling.

346 Q. Now he works part of the Box farm under Will Angling?

A. Yes, sir.

Q. What is your feelings towards these defendants?

A. Well, if I would tell it now—I hate to have to say anything about it, because it hurts me to tell it.

Q. It don't hurt you to tell the truth?

A. It hurts me to tell on the boys, because John is my son-in-law.

Q. I wish you would tell this jury how they found out all you know about it. How come them to find out what you know?

A. I thought John had to hang and M. F. would go clear, and I did not think that was right, so I told it to my husband and told a little of it to Nettie, John's wife. My husband said not to say anything about it. He said that they had enough down here anyway, and I did not say anything about it.

Q. When was you first summoned as a witness?

A. This spring 2 years ago, I guess.

Q. You was sticking to your son-in-law; you stuck so close to him that you would not let your daughter stay at your house, because she would not quit him?

A. No, sir.

Q. Did you not refuse to let your daughter stay at your house?

A. No, sir.

Q. Did you not tell your daughter that she could not come to your house unless she quit John Ball?

A. No, sir.

347 Q. Has she ever been in your house since?

A. Yes, sir.

Q. Where is she living now?

A. On Mud Creek.

Q. Where was she while he was in jail?

A. With Bob Boutwell a little while, then with me.

Q. How come her to leave your house?

A. She left on her own hook; I was not the cause of it.

Q. What time of day did she leave?

A. At night.

Q. What time of night?

A. Early candle light.

Q. What made her leave?

A. She got mad at the supper table.

Q. What about?

A. Because I told her little child not throw a fork in my child's face she got mad and got up and left.

Q. I will ask you if you had not been trying to make her agree to quit John?

A. No, sir; never did I say such words. I never did say anything of that kind.

Q. Where did she go to?

A. To Mat Howard's house, I suppose.

Q. What did she get mad about?

A. She got mad because her baby was going to throw a fork in
348 my little boy's face.

Q. How old was her baby?

A. I suppose a year or over old.

Q. On Sunday before the killing Filmore said he would not be surprised if he or old man Box one was found dead?

A. Yes, sir.

Q. Don't you know what he was talking about?

A. No, sir.

Q. Don't you know that there had been an understanding that there was some feelings between Box, Filmore, and Mayfield, the husband of that woman, and that was what he was speaking of? Mayfield was supposed to be a bitter enemy of him and old man Box, both?

A. I don't know.

Q. How did you take it—did you take him to mean that he was going to kill old man Box?

A. I did not know what he meant.

Q. From the run of his conversation did you understand that to be what he meant?

A. I did not know what he really me'nt.

Q. Old man Box had not been killed then?

A. No, sir.

Q. He was restless nights, saw ghosts, haunts, and all those things?

A. That is what he said.

349 Q. That was before old man Box was killed?

A. Yes, sir.

Q. You got any husband?

A. Yes, sir.

Q. Did he hear it, to'?

A. Yes, sir; he was lying down in the room and Filmore was sitting in the door.

Q. He heard every word of it, did he?

A. Yes, sir.

Q. Where is he now?

A. He is at home.

Q. He was lying there again' the door resting, and in the presence of you and your husband he told all of this?

A. Yes, sir.

Q. The time he come to your house after the killing was on the morning of the 27th, and Box was killed that night?

A. Yes, sir; Box was found on the 26th morning, the morning of the 27th morning he come to my house.

Q. After Box was buried, then, he come to your house, and said they were tracking around; that they were going to arrest him; that he did not care, so far as he was concerned; that there was plenty others that would fit his track, but he told you that the track would just exactly fit your son-in-law's?

A. He said the tracks would just exactly fit Bob and John's.

Q. So far as he was concerned, he was all right; he come to
350 you and told you that your son-in-law and Bob Boutwell had murdered old man Box?

A. He said so far as he was concerned he was not afraid, but he said the tracks would just exactly fit Bob Boutwell and John Ball.

Q. Did you not understand that he was charging your son-in-law with the murder of old man Box?

A. I don't know.

Q. Do you tell this jury that he come to your house and charged your son-in-law and his brother with the murder of old man Box?

A. He said as far as he was concerned he was not afraid, but he was perfectly satisfied that the tracks would fit Bob Boutwell and John Ball.

Q. You understand that he was stating in effect that his brother and brother-in-law had committed the murder?

A. That is the way I looked at it.

Q. What did you say to him?

A. I did not say anything to him.

Q. Why did you not ask him what he meant by charging your son-in-law with that murder?

A. I don't know.

Q. You thought well of John?

A. Yes, sir.

351 Q. You understood that he was telling you that the tracks would show precisely that your son-in-law and his brother-in-law killed that man?

A. Yes, sir.

Q. You was not alarmed at them arresting your son-in-law?

A. It bothered me a little.

Q. Why did you not ask him about it?

A. I just did not do it.

Q. You kept this all to yourself until after Filmore was acquitted and come back up there?

A. Yes, sir.

Q. You are living on the Box farm and then you tell it?

A. I have been living on the Box farm all the time.

Q. You was not under Angling all the time? He said if it had not been for Joe Cross and Ed. Berney they never would have bothered them. Who was with him when he come to your house?

A. No one at all.

Q. Was not John Ashby with him when he come?

A. He was at my well.

Q. How near was the well to the house?

A. As much as 10 steps, I reckon.

Q. Did Filmore come in the house?

A. He sit on the door step.

Q. How close to the well?

A. About 10 steps from the well?

Q. Was there anybody else present but Ashby and you?

A. He went on about his business, I suppose; I never saw him

352 any more.

Q. You know whether he was standing there?

A. I don't.

Q. You doa't say he was not standing there?

A. I don't know where Ashby was at the time?

Q. What did Filmore want there?
A. He stopped at the door and was talking.
Q. Was he walking o' riding?
A. He was riding. He very often come to our well to water his horses.
Q. Did he water his horse there?
A. No, sir.
Q. Was any of your family there?
A. They were all chopping cotton.
Q. What time of day was that?
A. Tolerably early in the morning, along towards 9 o'clock, I suppose.
Q. Have you had any talk with anybody about this case since you was subpœna'd in this case?
A. I have had nobody to post me.
Q. What do you mean by posting you? Have you had much experience in court?
A. No, sir.
Q. How did you get on to that phrase—posting a witness?
A. I have not talked or had anybody to tell me.
353 Q. Hain't had anybody to post you?
A. No, sir.
Q. What do you intend for the jury to believe by the words posting a witness? What do you mean by that phrase posting a witness?
A. That is what I understood you to ask me.
Q. Did you understand Col. Hanney to ask you if anybody had been posting you?
A. No, sir.
Q. Did he not ask you if John talked to you?
A. Yes, sir.
Q. Why did you not understand that he asked you if anybody had posted you? Who have you talked with?
A. I have told it to several.
Q. Who did you first tell it to?
A. My husband.
Q. Who next?
A. Dallas Smith.
Q. Who have you talked to since you come here?
A. I have never talked to anybody since I came here except Mr. Hanney.
Q. Have not talked to Joe Cross?
A. No, sir.
Q. Not spoke to him?
A. Yes, sir.
354 Q. Talk to Ed. Berney?
A. No, sir.
Q. You are a good friend of John, your son-in-law?
A. I think well of him.
Q. You want to see him come clear?
A. If he could, I do.
Q. You hate to testify against him?
A. Yes, sir.

Q. You want to see him come clear in this case?
A. I would hate to see him punished.
Q. He is your son-in-law, you hate to testify against him?
A. Yes, sir.
Q. Why was it you would not tell him what you knew when he asked you?
A. Because I did not want to tell him; I did not want to make him feel bad.
Q. You denied knowing anything?
A. I told him they did not ask me anything.
Q. Why did you tell Mr. Hanney all about it?
A. Because he asked me.
Q. You thought more of Mr. Hanney that you did of your son-in-law?
A. No, sir.
Q. Why did you not tell John?
A. Because I did not want to hurt his feelings?
355 Q. How long since his wife has been at your house?
A. She was to see me last January.
Q. You declined to tell John; he asked you politely, did he not?
A He come in there quizzing around about what I knew; I just told him so get rid of him.
Q. Did you not tell him that you did not know what they wanted with you, that you did not know anything? Why did you not tell him what you knew?
A. Because I did not want to hurt his feelings.
Q. You did not want to tell him; you was waiting to get to hurt his feelings on the witness stand?
A. No, sir; if I had to tell it, why I told it. If I had not, I would not have told it. He asked me if I knew what I was coming for; I told him I did not.
Q. Did you not tell him that you did not know anything about it?
A. I told him I did not know what I was coming for.
Q. Did he not ask you what you knew about the case?
A. No, sir; he just asked me what I was coming down here for.
Q. He knew you was coming as a witness?
A. Yes, sir.
Q. He wanted to know what you were coming for; you were asked when you were down before by parties what you would testify to, by the friends of the defendants; did not John ask you down here?
356 A. No, sir; he never asked me nothing.
Q. He ask you on the train the other day?
A. No, sir; he never spoke to me on the train.
Q. When was it he asked you?
A. 3 weeks ago last Monday he was at my house and asked me.
Q. Then you knew deep down in your soul you wanted him convicted; you are here for that purpose.
A. No, sir; I would hate to see him convicted.
Q. Could you put your hand on your heart and tell me you don't want him convicted?
A. Yes, sir.

Q. You told several up there about what you knew; you talked around what you knew against them. I will ask you if you did not tell Mrs. Howard that you did not have anything against Bob Boutwell (that is, her brother), but that you intended to swear everything you could against Filmore Ball?

A. No, sir; I never told her anything of the kind.

Q. You know Ed. Skaggs?

A. Yes, sir.

Q. Did you not tell him that you intended to swear enough to convict Filmore if you could?

A. No, sir.

Q. Did you talk to him at all?

A. Yes, sir; but I never had an idea to do such a thing in my life.

357 Redirect:

Q. Counsel has asked you about your talking about this case. You told what you knew about it after John and Bob Boutwell was convicted. You was never summoned as a witness before that?

A. No, sir.

Q. Did you testify at the former trial of this case?

A. No, sir.

Q. When was it that you spoke about this conversation with Filmore that Col. Hodges has been asking you about in regard to your reason why it was that you did not testify against John?

A. That was after the trial and I thought that John would have to hang anyway.

Q. Where was John at that time?

A. Him and Bob Boutwell were in jail.

Q. That was the time you have reference to?

A. Yes, sir.

Q. What was that he said to your husband about throwing in?

A. He wanted us to throw in to help pay him out. Mr. Ryder told him that he would not throw in nothing; that he knew he was the whole cause of it I told him that he knew he was the whole cause of it, and he knew that I knew it; that I knew he was the whole cause of John having to hang. I told him John had to hang now. He said he did not know yet. I told him that he would, and he knew that he was the whole cause of it.

358 Q. What did he say?

A. He would not say nothing; just drop his head.

Q. He was tried here at the same time. Anything said about him being tried?

A. No, sir.

Q. Did he say anything about that afterwards?

A. Not to me.

Q. You were kind to your daughter? She lived there. You and her were on friendly terms?

A. Yes, sir.

Q. Has she visited you since she got mad about the fracas that occurred at the table?

A. Yes, sir; she has been to see me twice since.

Q. Twice that you know of since that time?

A. Yes, sir.

Q. Now, where has Filmore lived since he was tried down here and acquitted?

A. He has been up on Mud Creek.

Q. Was he up there during the time that Bob and John were here in jail? After he got out did he live up there?

A. He went there after he got out.

Q. I believe you stated that your daughter lives on Mud Creek. Was she living there at the time Filmore was out?

A. No, sir.

Q. Did she afterwards go there?

359 A. She never went until after John come back.

Q. Where had she been?

A. She staid part of the time with Bob Boutwell's folks; she never was there at all until after John got out and took her up there.

Q. How far is it from Mud Creek to where you live?

A. I don't know just exactly.

Q. Where did she go at the time you spoke about the falling out about the children?

A. I suppose she went to Howard's.

Q. How long did she stay away?

A. She came back the next morning and got a few things and went back.

Q. How long after that before she come again?

A. She never come back again until long the first of last March one year ago.

Q. She came back to see you then?

A. Yes, sir.

Q. Now, after she left there you don't know where she staid or who she staid with of your own knowledge?

A. No, sir.

Recross:

Q. Can you tell me why you did not tell the jury what was said between you and Filmore during the examination until since dinner; why

360 did you not tell it when you first went on the stand?

A. I just told what I understood him to ask me.

Q. He asked you what was said between you and Filmore and John; why did you leave off all you are telling now; it was the same conversation, was it not?

A. He told it all to me; I did not happen to think of it.

Q. What brought it to your mind since dinner?

A. I was just thinking about how he spoke it.

Q. Who have you talked to since dinner?

A. No one.

Q. Who have you talked to since you went off from the witness stand?

A. I spoke to this gentleman here.

Q. Talked to anybody else about this case?

A. No, sir.

Q. Not a word?

A. I hain't said nothing of that kind at all.

Q. You told Filmore that he was the cause of John being in trouble?

A. Yes, sir.

Q. You did not think to tell the jury that at the start; you forgot to tell that before dinner; that was in the same conversation you related before dinner?

A. Yes, sir.

Q. Why did you not tell it all then?

361 A. He did not ask me only part; I just told him the part he asked me.

Q. He asked you what was said, did he not?

A. Yes, sir.

Q. Now, then, did you ever do anything to help John, or offer to do anything?

A. Nothing; only to help them in their work and such as that.

Q. Your husband said he would see him as far in hell as a pigeon could fly before he would see him out?

A. Yes, sir.

Q. You remember Mrs. Howard and Mrs. Ball was expecting a new trial for the boys?

A. Yes, sir.

Q. You remember of having a conversation with them over at the northeast corner of the Box farm?

A. Yes, sir; with Nettie Ball and Mrs. Howard.

Q. I will ask you if you did not tell those 2 ladies that if they got a new trial you intended to swear enough to convict them again?

A. No, sir; I never told them any such a thing.

Q. What was said?

A. I never said anything, only this: Mrs. Howard was going to bring some money down here; I says, Mrs. Howard, I would not pay it in without they promised to do something for the boys; she told me they told her they could not work on promises.

Q. Nothing was said about what would happen if they got a new trial?

362 A. Mrs. Howard says to Nettie, if they can't get a new trial, I will go and make Bob own to it and Filmore shall hang with them.

Q. She said she would go and make Bob own to it and Filmore should hang with the rest of them?

A. She said that to Nettie; I was listening.

Q. You and your daughter are perfectly good friends now; she visited you last year?

A. Yes, sir.

Q. Don't you know she don't speak to you?

A. I speak to her whenever I meet her; I would do as much for her now as I ever would.

Q. When did you speak to her last?

A. I spoke to her and talked with her on the train.

Q. You speak to John?

A. I do when I see him.

Q. Have you spoke to him since he has been here?

A. I have not had any chance to speak to him since he has been here.

Q. Did you see him on the train?

A. I did not see him in time to speak to him.

Q. You have not talked with Will Angling about this case?

A. No, sir; I hain't had no talk; of course I would tell this that I have been telling here to anyone that would ask me.

Q. Hain't you mistaken about telling it to just anybody that asked you?

363 A. I would tell it to anybody that got to talking to me about it—any of my folks.

Q. You told it to Will Angling or anybody else?

A. Yes, sir.

Q. You don't tell it to John Ball, do you?

A. I would tell it to John if I thought it was necessary, but I did not think it necessary.

Q. You would tell it to anyone that came along; did you not swear before dinner you had never told it to anyone but Col. Hanney, fully about what you knew?

A. Since I came down here, you mean?

Q. At any time?

A. I have not told anyone down here but Col. Hanney.

Q. How long since you first begin telling about what you knew?

A. After I found out John was gone. I thought when he was sentenced I thought he was gone; that is just the time I told it.

Q. You thought so much of John that you just kept it a secret?

A. I thought they sure go, and I kept it for his wife's sake.

Q. Why did you not tell John?

A. Because I did not want to.

Q. Why did you not want to?

A. Because I thought they would find it out soon enough.

Q. You did not feel much kind to him when you refused to tell him what you would swear; was you mad when you would not tell him?

A. No, sir.

364 Q. Was your feelings bad towards him?

A. No, sir; but then I did not want to tell him.

Q. Why did you not want to?

A. Because I did not want to.

Q. Anybody advise you not to tell it?

A. No, sir.

Q. Can you give any reason why you refused to tell your son-in-law what you would swear in the case?

A. I told you I did not want to.

Q. When he come in the kitchen and asked you what you was coming down here for, who was present when he asked you that?

A. There was no one.

Q. Why did you not tell John?

A. Because I did not want to.

Q. Is that the only reason, just because you did not want to?

A. Yes, sir.

Q. Why did you not want to?

A. Just because I diden't.

Q. Filmore told you that he had gone down there and shot off the gun?

A. He told me he went down there and shot that other load out of the gun and left it fresh shot.

Q. He told you the boys killed Box with the other load?

A. No, sir; he did not.

Q. He said he went down and shot off the other load. Did he
365 not tell you Bob and John went down and killed Box with the other load?

A. No, sir.

Q. You understand that from what he told you?

A. I believed from the run of his conversation that of course they done it.

Q. You understood him to mean that they shot Box with the other load? You understood him to mean that the other load killed Box?

A. He did not say it did.

Q. Did you understand it that way?

A. No, sir; I understood he had gotten them into it and was trying to get himself out and he had shot off the other load.

Q. How would that get him out?

A. I don't know.

Q. He told you the boots and shoes would fit the tracks of Bob and John?

A. He told me he was satisfied Bob and John's tracks would just exactly fit.

Q. He told you that he had shot the other load out of the gun and left it fresh shot?

A. Yes, sir; he asked me if I thought they would still think it was John's gun that did the killing?

Q. He did not want them to think that John had gone and done it?

A. I don't know.

366 Q. Do you remember telling the jury this since you commenced talking: that he could show that they were not his tracks and nobody would ever suspicion the other boys of doing it; did you not since you got on the witness stand before dinner tell the jury that Filmore told you that he cared nothing about them arresting him, because he played the 2 last sets for the dance and could prove where he was and nobody would suspicion Bob and John?

A. Yes, sir.

Q. He was not at all afraid for them to take him and try him for he played the 2 last sets, and nobody would ever suspicion Bob and John doing the deed?

A. Yes, sir; he said everybody thought he was as good friend as the old man had.

Q. He asked you if you believed they would still think John's gun did the killing?

A. Yes, sir.

Q. Who did you understand he thought did the killing? What gun, if he was at the dance?

A. I don't know who he meant.

Q. Your testimony pretty well covers the ground in this case; John's gun done the killing; he told you so in effect; also tells you they would not suspicion John and Bob, although their boots would just exactly fit the tracks; he could prove himself out, and nobody would ever suspicion John and Bob.

367 A. Yes, sir; he told me those very words.

* * * * * * *

389 ED. BERNEY.

Do you know the defendants here, Bob Boutwell, John Ball, and Filmore Ball?

A. I do.

Q. All white men, non-citizens of the I. T.?

A. Bob and John are white men; there is some dispute as to Filmore.

Q. You have known Filmore up there?

A. Yes, sir.

Q. Did you know Mayfield?

A. Yes, sir.

390 Q. You know Mrs. Mayfield?

A. Yes, sir.

Q. That the wife of Seef Mayfield?

A. Yes, sir.

Q. Daughter of old man Box, Lucy Mayfield?

A. Yes, sir.

Q. Afterwards called Lucy Ball?

A. Yes, sir.

Q. Now, after the marriage of Mayfield and her, do you know of Ball living there with her?

A. Yes, sir.

Q. That was Filmore lived there with her?

A. Yes, sir.

Q. You knew old man Box?

A. Yes, sir.

Q. Known him how long?

A. Well I have known him ever since I was big enough to recollect.

Q. Do you know what kind of terms Filmore was on with Box at the time of the death of Box?

A. I could not say.

Q. Do you know from what Filmore said whether he was on good terms or not?

A. I don't think he was, from what he said to me on different occasions.

391 Q. Was Mayfield alive at the time Ball was living with Lucy Mayfield?

A. Yes, sir.

Q. You state you had known Box a good long time?

A. Yes, sir.

Q. You were a citizen up there?

A. Yes, sir.

Q. You are a brother of Wes Berney?

A. Yes, sir.

Q. Governor Berney, of the Chickasaw, Nation a half brother of yours?

A. Yes, sir.

A. How long had you known the Balls up there in the Territory?

A. I think I had known them 3 or 4 years.

Q. State if you heard Filmore say anything on any occasion about whether Box objected to him living with his daughter—anything he said in regard to it.

A. I don't believe that I can recall any of the conversation in regard to it. Ball used to talk to me frequently about his and the old man's differences and ask my advice as to what I thought was best to do, but it has been so long that I can not recall any particular word that passed between us.

Q. Do you know what Filmore said about what the old man had against him—why the old man disliked him? If he said he disliked
392 him, was it not on account of his daughter? If you know from what Filmore said at any time, no matter when?

A. As I say, I can not recall anything that he said; I can't recollect it now.

Q. You have been interested some in the prosecution of this case, have you not?

A. Yes, sir.

Q. You have assisted in the prosecution of this case?

(To which question and proposed answer counsel for the defendant at the time objected because the same was irrelevant and immaterial, but their objections were by the court overruled and said witness permitted to testify as follows:)

Q. You stated you and Cross employed counsel to help prosecute in this case?

A. Yes, sir.

Q. Was your employment of counsel in this case caused by any ill feelings you had towards these defendants?

(To which question and proposed answer counsel for the defendant at the time objected because the same was irrelevant and immaterial, but their objections were by the court overruled and said witness permitted to testify as follows:)

A. It was not.

393 Q. I understood you had known Box about how long?

A. About 20 or 25 years.

Q. He was your neighbor?

A. Yes, sir.

Q. Been one of your neighbors ever since you can remember?

A. Yes, sir.

(To which judgment and ruling of the court each of the defendants at the time excepted.)

Q. Now, did you go there the morning after the killing of Box?

A. I did.

Q. When were you notified that he was killed?

A. The best of my recollection it was about 8 o'clock in the morning.

Q. How long was it, then, before you got to him?

A. Just as soon as we could get to his house.

Q. How far did you live from him?

A. About a mile or a mile and a half.

Q. Who went over there with you?

A. Joe Cross.

Q. How far did Cross live from you?

A. I was living with Cross at the time.

Q. Where was the body of Box at when you got there?

A. It had been brought in and laid out on the porch.

394 Q. Were you familiar with that Box plantation at that time?
A. Yes, sir.
Q. Examine that diagram and see if you understand it, the location of Box's house, and all the different places.
A. Yes, sir; I think I do.
Q. He was said to have lain right in that turn row; did you go out there after you got there?
A. Yes, sir.
Q. Did you notice anything there?
A. Yes, sir; I noticed some tracks.
Q. How many different tracks did you notice?
A. There was 2 different tracks.
Q. Tracks of 2 different persons?
A. Yes, sir.
Q. What kind of tracks were they?
A. One was a large tracks and one was a small track.
Q. Did you follow them tracks?
A. Yes, sir.
Q. Did you examine them?
A. Yes, sir.
Q. Which way did they lead? Describe now; go over and tell what you did.
A. After we examined the first 2 tracks, the tracks leading right back into that turn row next to the fence and went up the turn row
395 until they got to the corner of that orchard and turned east and went some 50 or 60 yards and went back through this piece of ground around in that direction and back to this turn row, we followed that on up and crossed along in the turn row on both sides; the ground had been well cultivated and was perfectly clean; we followed that turn row on up, as well as I remember; we followed that track on, myself and Jasper Moore, and we come on back inside the farm. I was not satisfied as to that big track up there, and we come down here and found that track that we saw down here had turned in this turn row here and gone out in this direction; we followed it out until we found the track come back in this direction; we examined and saw that it was the same track that we was following, as well as I remember, that come up to this track, and we found where that track in that corn row here had turned in the turn row and come down the turn row; occasionally we could not see the track in the turn row on account of some places being rough and some places being clean; after Cross and them come back we went on to the house and staid there some little bit, and, as well as I remember, got on our horses and went on out where we had left the track here and taken the track again, and the track led right into Boutwell's yard; as we went on this track there we saw where the track come out of the yard down here to the corn, and along here we tracked both going and coming.
Q. How many tracks did you have reference to along there?
A. 2 tracks.
396 Q. Tracks of 2 different persons?
A. Yes, sir.
Q. A large and a small track?
A. Yes, sir.

Q. What was the appearance of those tracks from Boutwell's house up to the killing, the tracks through the oat stubble? Did they show how they were running?

A. Yes, sir.

Q. Go on now and tell just what occurred.

Q. You come back now to the large track; did it seem to be running there; the track coming down to where the dead body laid; coming from towards Boutwell's house? Go on and state what you did and saw there.

A. We went to the well to get us a drink of water; Filmore was there; he come out and brought us a dipper out; after we got a drink we told him we was going over to the place where they was making a coffin for Box. He says, I believe I will go with you; I told him my horse was gentle; to get up behind me and ride. He did so.

Q. Anything said to him about what you were tracking?

A. No, sir.

Q. Could he see you come there watching those tracks?

A. I suppose he could; it was a plain view of the house.

Q. What time was it when you saw Filmore at Bob Boutwell's?

A. Somewhere between 10 and 11 o'clock, when we got back to

397 the place of the killing, where Box was dead.

Q. Did you examine that turn row?

A. Yes, sir.

Q. Who was with you?

A. Dallas Smith.

Q. How far did you follow the track back?

A. 150 or 200 yards.

Q. Was there any other track there besides the track of old man Box?

A. Only the one track in the turn row that we could see.

Q. Did you notice any other tracks leading to where the dead body was?

A. After we come back some of the parties went in to dig the grave; they discovered these tracks here and they called mine and Cross's attention to it; we went out there and saw the tracks of 2 of them here; there was a third track here; we followed this track here through this orchard; I only examined as far as the fence; I did not cross the fence; the track come right to the fence there.

Q. There was the track of 3 different persons there?

A. Yes, sir; tracks going and coming from the graveyard.

Q. Coming to the dead body and going back?

A. Yes, sir.

Q. What was around the graveyard?

A. Right in the corner of this orchard was a little graveyard.

398 Q. How was it enclosed?

A. The best of my recollection, it was not enclosed just in the corner of the orchard.

Q. What did you notice on the outside of the fence there; anything?

A. I did not examine any of the tracks on the outside.

Q. I understood you to say that 2 of those tracks going and coming were the same tracks that led from Bob Boutwell's house, up and back?

A. Yes, sir.

Q. How do you know?

A. We took the measure of the tracks.

Q. Did you apply that measure to them tracks you taken to be the same track?

A. Yes, sir; and the measure corresponded exactly with the tracks.

Q. Did you get any boots or shoes there at any time? Did you go back to those tracks any more after that?

A. Yes, sir; after the boys were arrested I went back with Hee Thomas, Joe Cross, and Horn, and we had a pair of boots that we took that we got at John's house.

Q. Where did you get them at at John's house?

A. I did not see Hee Thomas where he got them.

Q. Was there any peculiarity about them tracks or not? If so, what was it, if you noticed any?

399 A. Nothing more than the small track of the boots seemed to be run down some. I noticed that one side of the heel made a deeper impression in the ground than the other of the small track.

Q. Did you notice any peculiarity about the large track?

A. Nothing; only the sole of it seemed to be flapping back.

Q. What was the character of the soil at the time you measured them, as to whether you could get a good impression or not?

A. The ground, as well as I remember, had been freshly plowed, and there had been a light shower of rain, probably a day or two before that, just enough rain to form a crust on the ground and make a perfectly plain track.

Q. When you got the boots, now, the large boots from John's house, state what you did then—what occurred after you got them.

A. After we got the boots and gun at John's we went from there up to Bob Boutwell's house and the Filmore Ball's. We looked for ammunition at Filmore's, but could not find anything. When we come to Bob Boutwell's there Hee Thomas searched for ammunition and he found some shot, powder, and caps, and some paper, all in a drawer together.

Q. Did you notice where any paper had been torn there?

A. No, sir; I did not notice that.

Q. Did you notice the condition of the gun?

A. Yes, sir; it had been freshly shot.

400 Q. Was it a double-barreled shotgun?

A. Yes, sir.

Q. Now, what did you do after you got them boots at John's house?

A. After we got them we come back where the boys were under arrest over here south of Box's house where they were held, and Hee Thomas taken off one of Filmore's shoes and taken Bob Boutwell's boots and those boots we had of John's, and he and I and Joe Cross and John Horn went back and placed Bob Boutwell's boots in the little tracks we discovered there; also placed John's in the large track and they both fit exactly; we then tried them in the tracks in the orchard in several places and they fit exactly; and we put Filmore's shoe in the 3rd track and it was an exact fit; from there we went across the fence into this corn; when we got there we tried Bob Boutwell's and John Ball's boots in these 2 tracks here and they exactly fit.

Q. Examine those boots and shoes and see if they are the ones you had up there.

(Identifies boots and shoes.)

Q. Notice them boots there and see if they are in the same condition now that they were at that time or not—John's boots.

A. That sole was not ripped off that much, and that gash was not so long.

Q. Then it has been cut since coming down here?

A. Yes, sir.

401 Q. You stated they fit the different tracks; the small boot fit that small track both going and coming from Bob Boutwell's house?

A. Yes, sir.

Q. Did you notice anything whether there was any soil or dirt on any of the boots?

A. Yes, sir; those boots of John's showed that they had been worn in the dew, and dirt had accumulated in the boots nearly $\frac{3}{4}$ of the way up the boots.

Q. How long did it look to have been put there?

A. It did not look like it had been there more than one night or two.

Q. What kind of dirt was it; what was the character of the coil?

A. Kind of sandy, loamy soil.

Q. Now, you know when Hec Thomas come there; what was done when he come? Don't answer unless you know whether he talked to the different parties there, and made an investigation.

A. Yes, sir; he did.

Q. Was he an officer from the Ft. Smith court at that time?

A. Yes, sir.

Q. You know the condition of that gun, whether both barrels had been shot off or not?

A. Yes, sir; both barrels had been freshly shot.

Q. Was it empty at the time you got it?

A. Yes, sir.

402 Q. Was that the same gun that was brought down here to court; you saw the gun here?

A. I don't know that I have.

Q. Had you known the gun before that?

A. No, sir.

Q. I understood you to say that you only found the one track in that turn row?

A. Yes, sir; we found no track in that turn row outside of the track I found down here near the body.

Q. You noticed some tracks on the outside there; was that in the road?

A. Yes, sir.

Q. Going from towards Bob Boutwell's house?

A. Yes, sir.

Q. You noticed the tracks did not come in there on that turn row?

A. No, sir; they did not come in there.

Cross-examination:

Q. You say Box was a citizen of the Chickasaw Nation—had been for years?

A. Yes, sir.

Q. Filmore Ball was his son-in-law?

A. He lived with his daughter.

Q. Well, don't you know he was his son-in-law, he married that woman?

403 A. I don't know that he ever married her.

Q. You understood that he never married her?

A. No, sir.

Q. Why did you say that he lived with her if you understood that she was his wife?

A. Well, I was at his house several times and saw them living together.

Q. You say Mayfield was her husband; did you see them married?

A. No, sir.

Q. You say Mayfield was her husband?

A. No, sir; I don't say that.

Q. You don't know anything about Mayfield being her husband in fact?

A. No, sir.

Q. No more than of Ball being her husband?

A. No, sir.

Q. You say there was a dispute about Filmore being a citizen?

A. Yes, sir.

Q. When did that dispute get up?

A. I have heard of it ever since he married.

Q. I will ask you if he did not vote up there when you was judge of the election before this last law was passed?

A. If he did I don't recollect it.

Q. You don't deny that he did?

A. He may have; I don't recollect if he did.

404 Q. You was running for collector?

A. Yes, sir.

Q. Grey for governor. Don't you know Filmore voted in that election?

A. No, sir.

Q. You know Filmore had a permit issued from the authorities to put people on their places?

A. Yes, sir.

Q. They don't issue them to anyone not citizens?

A. Sometimes they do and sometimes they don't.

Q. You was the very man who issued some of them, did you not?

A. I don't remember that, either.

Q. To refresh your memory, see if you did not issue that permit to him?

A. Yes, sir; I may have. I have acted as deputy.

Q. He is the one who owns a place up on Mud Creek under his right as a Chickasaw?

A. I have been told that he had a place there; I have never seen it.

Q. You know whether he was recognized as one of the party when they paid off their money to them?

A. No, sir.

Q. You know whether there was any dispute as to his right to receive the money?

A. No, sir.

Q. Did you make that map?

405 A. I assisted in making it.

Q. That is correct, is it?

A. To the best of my knowledge, it is correct.

Q. From your knowledge of the country, you think the distances on that map are as near correct as you can get them?

A. Yes, sir.

Q. What do you mean by distances?

A. I mean from one point to the other. We could not tell anything about the distances. That is the proper shape of the place.

(Explains map and the location of different places on the map.)

Q. That is John Bell's up there in the corner?

A. Yes, sir.

Q. How far is it from there to Bob Boutwell's?

A. The best of my recollection it is somewhere between three-quarters and a mile.

Q. How far from John's to old man Blunt's, at that time?

A. I guess it was a half or three-quarters of a mile.

Q. Is that the best you and Joe Cross could do at making a map?

A. Yes, sir; that is the best we could do.

Q. How far is it from Bob Boutwell's to Filmore's?

A. Between a quarter and a half a mile.

Q. Filmore is back over on the corner?

A. Yes, sir.

Q. How long after Hee Thomas got there before the arrest was made?

406 A. I kept him there talking with different parties 15 or 20 minutes, may be 30 minutes.

Q. In 15 or 20 minutes after Hee Thomas got there he started parties out to arrest them?

A. Yes, sir.

Q. Then Hee Thomas never saw the tracks until after the arrest was made?

A. If he did, I don't know.

Q. Don't you know he did not?

A. No, sir.

Q. You do know that he never examined any tracks there until after he started out to make the arrest?

A. No, sir.

Q. After the arrest was made and you got the boots of both of these defendants then you and Hee Thomas, Joe Cross, and Horn went off to examine the tracks?

A. Yes, sir.

Q. Tell the defendants where you were going?

A. I don't know that we did.

Q. Did you ever tell them that you had measured the tracks?

A. No, sir; I did not.

Q. Did you ever notify them that you had taken the boots and shoes off and fitted them in the tracks?

A. I don't know.

407 Q. Hain't it a fact that you suppressed from them the fact that you had been measuring the tracks; that you held them under guard and never let them know where you had been with those shoes?

A. I could not answer that.

Q. Did you hear anyone tell them?

A. No, sir.

Q. As far as you know, it was kept a secret from them?

A. Yes, sir.

Q. I will ask you if you and Filmore did not have a dispute about a place up above there just before that?

A. Filmore plowed furrows within 30 or 40 feet of my field fence. I heard about it and went over there to see what he was doing, and told him that the law protected me a quarter of a mile from my improvements, and he dropped back.

Q. You did not like the way he was running the furrows yourself?

A. No, sir; not when the law protected me a quarter of a mile.

Q. Did he not tell you that he and another man actually measured off the distance the law required before he made a furrow?

A. Yes, sir.

Q. Did you ever measure it?

A. No, sir.

Q. How long was that before this killing occurred?

A. I don't remember exactly; a good long time, though.

Q. I will ask you when you and Cross tracked the tracks if you 408 saw anything peculiar about those tracks except the running down of the heel?

A. Yes, sir. I noticed in the small track one side of the heel made a deeper impression in the ground than the other.

Q. Did Cross notice that, to?

A. I don't know.

Q. Did you not talk about it?

A. No, sir.

Q. Who had the measures?

A. Joe Cross.

Q. He correctly measured them?

A. Yes, sir.

Q. Did any of you ever try the measures on one of them shoes?

A. I think Hee Thomas and Joe Cross did.

Q. Are you certain about that?

A. No, sir; I don't know for certain.

Q. When you brought the boys down why did you not say, Here, Cross, let's put the measures to these shoes?

A. Because he had the measures.

Q. You took the measures, took the shoes off away out of their sight to measure them; haint that so?

A. It could not say it was.

Q. You knew Cross had the exact measures of the tracks with him?

A. Yes, sir.

409 Q. If you wanted to act fair with these young men, why did you not put those measures to their boots and shoes in their presence?

A. I did not have them. Cross had them. I think Hee Thomas and Cross did apply them.

Q. Did you see them?

A. No, sir.

Q. Did they apply them in the presence of the defendants?

A. That was my understanding.

Q. Was you not present?

A. There was a large crowd there, and I was not right up where they were.

Q. Don't you reckon Cross knows whether he did or not?

A. I suppose so.

Q. If he ever did measure them you don't know it?

A. No, sir.

Q. You did not see them measured?

A. No, sir.

Q. You saw the shoes taken off; did you see them put in the tracks?

A. Yes, sir.

Q. If any of the measures was applied to the boots and shoes in the defendants' presence you did not see it?

A. No, sir.

Q. You don't know where these measures are now?

A. No, sir.

410 Q. You know anything about old man Box having some trouble with the Bace boys over some rent?

A. Yes, sir.

Q. They fell out?

A. Yes, sir.

Q. How long before the killing was that?

A. I could not tell.

Q. It was the crop before that, was it not?

A. I could not say whether it was one or two crops before that.

Q. They fell out about the rent?

A. I think so.

Q. Had quite a lot of trouble?

A. Yes, sir.

Q. You went to see them for him?

A. I tried to do something with them, but they notified me not to come back any more and I did not go.

Q. You know whether Box and Mayfield had had some trouble?

A. No, sir.

Q. You don't know what separated Mayfield and this woman?

A. No, sir.

Redirect:

Q. How long did Mayfield and her live together there?

A. I don't know that I could tell you.

Q. Were you invited to the wedding?

A. No, sir; I was not invited to the wedding, but I remember

411 about the time they were married.

Q. You know where they were married at?

A. No, sir, only from hearsay; my understanding was they were married in Gain'sville, Texas.

(We object to his understanding.)

Q. You have any talked with Nelson Jones about Bob Blunt's statement about the time he went with the boys after the whiskey?

Recross:

Q. Ever have a talk here at the State-court house—on the steps of the court-house—with Nelson Jones?

(We object; that is not in rebuttal.)

Q. Do you know Nelson Jones?

A. Yes, sir.

Q. You have talked with him some since he has been here?

A. Yes, sir.

The Government then offered in evidence a certified copy of the marriage license issued to C. S. Mayfield and Lucy O. Box in Gain'sville, Cooke Co., Texas, dated December 1st, 1881, which said marriage license is in words and figures as follows, to wit:

STATE OF TEXAS,
Cooke County:

To any judge of the county or district court, regularly licensed
412 or ordained minister of the gospel, Jewish rabbi, or justice of the peace, in and for said county of Cooke, greeting:

You are hereby authorized to solemnize the rites of marriage between Mr. C. S. Mayfield and Miss L. O. Box, and make due return to the clerk of the county court of said county within sixty days thereafter, certifying your action under this license.

Witness my official signature and seal of office, at office in Gain'sville, this 1st day of Sept., A. D. 1881.

[SEAL.]

E. F. BUNCH,
Clerk County Court Cooke Co.
By HARRY JACKSON,
Deputy.

I, R. M. Hancock, hereby certify that on the 4th day of Sept., A. D. 1881, I united in marriage C. S. Mayfield and Miss L. O. Box, the parties above named.

Witness my hand this the 10 day of Sept., A. D. 1881.

R. M. HANCOCK, *M. G.*

(Endorsed:) 1678. Class 2. Marriage license. C. S. Mayfield and Miss L. O. Box. Issued Sept. 1st, 1881. E. F. Bunch, Co. clerk. By Harry Jackson, deputy. Recorded in Book 3, page 557, of Marriage Records. Filed May 1, 1894. C. Dart, clerk. By H. H. Kirkpatrick, deputy.

(Further endorsed:) Returned and filed for record the 10 day
413 of Sept., A. D. 1881, and recorded the 10 day of Sept., A. D. 1881. E. F. Bunch, clerk.

(Further endorsed:) I, E. O. Peery, clerk of the county court of Cooke County, Texas, do hereby certify that the within and foregoing license is a true and correct copy of the marriage record of this (Cooke) county as

the same appears in Book 3, page 557. Given under my hand and seal of office this April 30th, 1894. [Seal.] E. O. Perry, clerk Cooke Co., Tex., by Tom Perry, Deputy.

To the introduction of which each of the defendants at the time objected. First, because the Government was seeking to prove the contents of a written instrument by secondary evidence, without making any effort to produce the original and without accounting for the loss or destruction thereof; and second, because said marriage license was not indorsed upon the back of the indictment against these defendants, and neither of them had any notice whatever that the said marriage license would be introduced in evidence against them; and third, because the Government, by the introduction of said marriage license, raised a collateral issue in this case, and one which neither of these defendants had any notice would be raised in this case. But the court, notwithstanding the fact that
414 the Government made no attempt to account for the original marriage license, and notwithstanding that no notice had been given either of these defendants that said marriage license would be introduced in evidence against them or either of them, permitted the Government to introduce the same in evidence before the jury, to which judgment and ruling of the court each of the defendants at the time objected.

* * * * * * *

414½ CHICKASAW NATION,
County of Pickens:

To any judge of the county or district court, ordained minister of the gospel in and for said county of Pickens, greeting:

You are hereby authorized to solemnize the rites of matrimony between Mr. M. F. Ball and Mrs. L. O. Mayfield, and make due return to the judge of the county court, within thirty days thereafter, certifying your action under this license.

Witness my official signature and seal of office, Pickens County courthouse, this the 31st day of August, A. D. 1886.

WILLIS DICKERSON,
Judge County Court, Pickens County.

I, Willis Dickerson, hereby certify that on the 31st day of August, A. D. 1886, I united in marriage Mr. M. F. Ball and Mrs. L. O. Mayfield, the parties above named.

Witness my hand this the 31st day of August, 1886.

WILLIS DICKERSON,
County Judge.

Recorded 31st day of January, 1887.

A. H. LAW, *Clerk.*

(Endorsed:) Recorded on page 105, Marriage Record of Pickens Co., C. N., Jan. 31st, 1887. A. H. Law, clerk P. Co., C. N.

(Further endorsed:) Filed Sept. 20, 1894. C. Dart, clerk. By H. H. Kirkpatrick, deputy.

NOTE.—The above marriage license was not among the files of this case when this portion of the record was reached, but was subsequently produced by defendants' counsel and filed.

* * * * * * *

418 The defendants, in order to sustain the issue on their part, introduced the following testimony:

First. The defendants offered and read in evidence a permit issued by the duly constituted authorities of the Chickasaw Nation, Indian Territory, to M. F. Ball as a citizen of said nation, authorizing him to permit non-citizens to till his land and reside in the Chickasaw Nation, and also a permit from the permit collector of the Chickasaw Nation to a man by the name of J. W. Holley, showing that M. F. Ball, the defendant herein, had paid the permit fee for him, the said J. W. Holley, to be employed in the Chickasaw Nation by M. F. Ball.

Second. The defendants then introduced in evidence Sec. 1 of the permit law of the Chickasaw Nation, approved October 17th, which was in words and figures as follows, to wit:

"SEC. 1. Be it enacted by the legislature of the Chickasaw Nation, That citizens of any State and Territory of the United States wishing to hire or rent land or be otherwise employed in this nation shall be required to enter into contract with a citizen, and after contract has been agreed upon the non-citizen shall place in the hands of the citizen a sufficient amount of money to pay permits, and that the permit collector shall receive no permit money from any other person except from a citizen of this nation, and for each and every violation shall be fined in any sum not less than $10 for each and every offense by the county judge of the
419 county where the offense was committed."

Third. The defendants then offered in evidence a marriage license, issued in the Chickasaw Nation by the county judge of Pickens County to M. F. Ball and Lucy O. Mayfield, showing that they were married in the said Chickasaw Nation prior to the time of the commission of the offense for which these defendants are now being tried, and which said marriage license is hereinbefore set out.

Fourth. The defendants then offered and read in evidence a certified copy of indictment No. 3, presented in the circuit court of the United States in and for the eastern district of Texas, holding sessions at Paris, Texas, against J. C. Ball, M. F. Ball, and R. E. Boutwell, which said indictment is in words and figures as follows, to wit: (See pages 16 to 19 of this record.)

Fifth. The defendants then introduced in evidence and read to the jury a certified copy of the record of the circuit court of the United States in and for the eastern district of Texas, holding sessions at Paris, Texas, in the case of the United States vs. M. F. Ball, J. C. Ball, and R. E. Boutwell, and numbered 3 on the docket of said court, which said record is in words and figures as follows, to wit:

Wednesday, October 30, 1889.

THE UNITED STATES
vs. } No. 3.
M. F. BALL, J. C. BALL, & R. E. Boutwell.

420 This cause coming on this day to be heard, came the United States, by her attorney, and announced ready for trial, and the defendants, M. F. Ball, J. C. Ball, and R. E. Boutwell, in their

own proper persons and by attorneys appeared and announced ready for trial, and thereupon the motion of the defendants for a severance herein was denied, and the defendants being arraigned plead not guilty, each and all of them, and thereupon came a jury of twelve good and lawful men, to wit: W. E. Hill, R. M. Miller, J. G. Oliver, Miles Yarbrough, A. P. Ball, J. M. Allen, John J. Lyons, Dan Perry, Fred. Nagel, Louis McDonald, W. D. Wasson, John Towns, who, having been duly tried, empanneled, and sworn as required by law, the hearing of the case was proceeded with to the hour of adjournment, and the same not being concluded the further hearing thereof was postponed until to-morrow.

Thursday, October 31st, 1889.

THE UNITED STATES
vs.
M. F. BALL, J. C. BALL, & R. E. Boutwell. } 3.

This day came the United States by her attorney and the defendants in *in* their own proper persons and by attorneys came, and the hearing of this cause was resumed before the court and jury, and the same not being concluded at the hour of adjournment, the further hearing thereof was continued until to-morrow morning.

421 Friday, November 1, 1889.

THE UNITED STATES
vs.
M. F. BALL, J. C. BALL, & R. E. Boutwell. } 3.

This cause coming on further to be heard, came the United States by her attorney and the defendants in their own proper persons and by attorneys came, and the hearing of this cause was resumed before the court and jury, and the same not being concluded at the hour of adjournment the further hearing thereof was postponed until to-morrow.

Saturday, November 2ond, 1889.

THE UNITED STATES
vs.
M. F. BALL, J. C. BALL, & R. E. Boutwell. } 3.

This cause coming on further to be heard, this day came the United States by her attorney and the defendants in their own proper persons and by attorneys came, and the argument of counsel was concluded, and the jury having heard the evidence, the argument of counsel, and received the charge of the court retired to consider of their verdict, and no verdict being returned at the hour for adjournment no adjournment is had, and court will remain open for the receipt of the verdict herein.

422 Sunday, November 3rd, 1889.

THE UNITED STATES
v.
M. F. BALL, J. C. BALL, & R. E. Boutwell. } 3.

This day came the United States by her attorney and the defendants in their own proper persons and by attorneys came, and the jury of twelve good and lawful men which heretofore had been tried, empannelled, and sworn, as required by law, having heard the evidence and argument of counsel and received the charge of the court, and having on a former day of this term retired to consider of their verdict, on this day brought into open court their verdict in words and figures as follows, to wit:

"We the jury find the defendants J. C. Ball & R. E. Boutwell guilty as charged in this indictment, and we find M. Filmore Ball not guilty. Nov. 3rd, 1889.

"A. P. BALL, *Foreman.*"

It is therefore considered by the court that the defendants J. C. Ball and R. E. Boutwell are guilty as charged in the indictment herein and as found by the jury, and it is ordered that they be remanded to the custody of the marshal and be by him committed to the county jail of Lamar County to await the judgment and sentence of the court.

It is further ordered that the defendant M. F. Ball be discharged and go hence without day.

423 Tuesday, November 12th, 1889.

THE UNITED STATES
v.
J. C. BALL & R. E. BOUTWELL. } 3.

This day this cause coming on to be heard upon the motion of defendants for a new trial herein, because it is the opinion of the court that the law is against the motion the same is overruled.

Friday, November 15th, 1889.—In U. S. circuit court, eastern dist. of Texas.

UNITED STATES
vs.
ROBT. E. BOUTWELL & JOHN C. BALL. } 3.

By reason of the law and the evidence and the verdict of the jury in this case it is ordered and adjudged that the defendants Robt. E. Boutwell and John C. Ball be executed by being hung until each and either are dead, according to the forms, delays, and processes provided in the laws of the United States.

This done and signed in open court, Nov. 15, 1889.

ALECK BOARMAN, *Judge.*

424 THE UNITED STATES)
vs.) 3.
R. E. BOUTWELL & JOHN C. BALL.)

This day the defendants in open court excepted to the sentence of the court this day pronounced upon them.

THE UNITED STATES)
vs.) 3.
R. E. BOUTWELL & JOHN C. BALL.)

The motion of the defendants for a new trial and in arrest of judgment herein coming on to be heard, because it is the opinion of the court that the law is against the motion the same is overruled; to which ruling of the court defendants excepted.

Friday, July 18th, 1890.

THE UNITED STATES)
vs.) 3.
ROBERT E. BOUTWELL.)

This day came the United States, by the United States attorney, and the defendant in his own proper person and by attorney appeared; and the United States attorney moved the court to fix the day of execution of the defendant Robt. E. Boutwell. And it appearing to the court that on the 15th day of November, 1889, during a former term of this court the
425 sentence of death was pronounced upon the defendant Robt. E. Boutwell for the crime of murder, in compliance with the law and the verdict of the jury rendered at that term of court, to wit, on the third day of November, 1889; and that no petition for writ of error to the Supreme Court of the United States has been filed with the clerk of this court, and no other proper proceedings for a revision of the findings herein by the Supreme Court of the United States have been begun, it is therefore ordered, adjudged, and decreed by the court that the defendant Robt. E. Boutwell be now remanded to the custody of the marshal, to be by him kept securely confined in the jail of Lamar County, Texas, until Friday, the 19th day of December, 1890, when he shall be taken therefrom by the marshal, and, between the hours of 10 o'clock a. m. and 4 o'clock p. m. of said 19th day of December, 1890, be hanged by the neck until he, the said Robert E. Boutwell, is dead; and the clerk of this court is ordered to issue a death warrant in accordance with this sentence and deliver the same to the marshal, who shall execute the same according to law.

Done in open court, July 18, 1890.

DAVID E. BRYANT, *Judge.*

426 Friday, July 18th, 1890.

THE UNITED STATES)
vs.) 3.
JOHN C. BALL.)

This day came the United States, by the United States attorney, and the defendant in his own proper person and by attorney appeared, and the

United States attorney mooved to fix the day of execution of the defendant John C. Ball. And it appearing to the court that on the 15th day of November, 1889, during a former term of this court, the sentence of death was pronounced upon the defendant John C. Ball for the crime of murder, in compliance with the law and the verdict of the jury rendered at that term of court, to wit, on the third day of November, 1889, and that no petition for writ of error to the Supreme Court of the United States has been filed with the clerk of this court, and no other proper proceedings for a revision of the findings herein by the Supreme Court of the United States have been begun, it is therefore ordered, adjudged, and decreed by the court that the defendant John C. Ball be now remanded to the custody of the marshal, to be by him kept securely confined in the jail of Lamar County, Texas, until Friday, the 19th day of December, 1890, when he shall be taken therefrom by the marshal, and between the hours of 10 o'clock a. m. and 4 o'clock p. m. of said 19th day of December, 1890, be hanged by the neck until he, the said John C. Ball, is

427 dead; and the clerk of this court is ordered to issue a death warrant in accordance with this sentence and deliver the same to the marshal, who shall execute the same according to law.

Done in open court, July 18, 1890.

DAVID E. BRYANT, *Judge*.

THE UNITED STATES } No. 3.
vs.
JOHN C. BALL. }

This day the defendant in open court excepted to the action of the court in fixing the day of execution of the defendant herein, and tendered his bill of exceptions.

THE UNITED STATES } No. 3.
vs.
R. E. BOUTWELL. }

This day the defendant in open court excepted to the action of the court in fixing the day of execution of the defendant herein, and tendered his bill of exceptions.

428 Monday, Nov. 10th, 1890.—In the United States circuit court in and for the eastern district of Texas, sitting at Paris, Texas.

THE UNITED STATES, PLAINTIFF,
vs.
J. C. BALL & ROBT. BOUTWELL, defendants. } No. 3. Order.

Be it remembered that on this 10th day of November, A. D. 1890, the same being the 25th day of the October term, 1890, of the United States circuit court within and for the eastern district of Texas, sitting at Paris, Texas, the above entitled cause came on for hearing upon a motion filed by the defendants J. C. Ball and Robt. Boutwell for the purpose of having an order entered of record in said case suspending the sentence heretofore pronounced upon the said defendants therein until the further action of this court.

There being present the plaintiff, The United States, by its attorney, Hon. J. H. Wilson, district attorney for the eastern district of Texas, and the defendants J. C. Ball and Robt. Boutwell in person and by their attorneys, Hodges, Pollard & Hodges,

And it appearing that the said defendants have duly filed their
429 petition for a writ of error in this court within the time heretofore allowed and have perfected their appeal in said case to the Supreme Court of the United States:

It is, therefore, considered, ordered, and adjudged that the said sentence heretofore pronounced upon the said defendants, and each of them, in this case be, and the same is hereby, suspended until the further action of this court, or until such further action the Supreme Court of the United States may direct.

It is further ordered that the clerk of this court shall forthwith deliver a copy of this order to the marshal of this court, in whose custody the said defendants now are, as prayed for by the defendants, and the said marshal shall govern himself accordingly.

Saturday, November 21st, 1891.

THE UNITED STATES
3. *v.* } Dismissed.
M. F. BALL ET AL.

Sixth. It was admitted before the court and jury by all of the
430 parties that the offense charged in the said indictment No. 3 and the offense charged in indictment No. 230 in this case is and was for one and the same transaction and offense, i. e., for the killing and murdering of Wm. T. Box by these defendants, and that the defendants, M. F. Ball, J. C. Ball, and R. E. Boutwell, charged in this indictment No. 230 are the same identical J. C. Ball, M. F. Ball, and R. E. Boutwell charged and tried upon said indictment No. 3 in said circuit court of the United States, and not other and different persons. It was further agreed by all the parties hereto before the court and jury that no appeal was ever prosecuted from the judgment entered in said cause No. 3 as to the defendant, M. F. Ball.

Seventh. The defendants then introduced the following oral testimony:

* * * * * * *

477 JOHN HAYES.

What time of day did you find out old man Box had been killed—what time did you hear it?

A. I don't recollect what time of day it was Filmore come down to Berneyville to get a shirt for him; sometime the next day.

Q. The first you heard of it was when Filmore come to Berneyville to get his shirt?

A. Yes, sir.

Q. You don't remember what time of day it was?

A. No, sir.

Q. That was the first knowledge you had of it?

A. Yes, sir.

* * * * * * *

492½ BOB BLUNT.

Did you ever see John Ball wear these boots you saw exhibited by the court prior to the dance at Bob Boutwell's house?

A. Yes, sir; I guess I have.

Q. Did you ever notice anything peculiar about either one of the
493 soles to the boot prior to that time?

A. Well, I think there was one of the soles ripped off.

Q. When did you see that?

A. Sometime before the dance.

Q. Did you see John fix it—do anything to it?

A. He tied a string around here one day when I was with him.

Cross-examination:

Q. You stated you went over to Box's house the next morning; who was there with those little children?

A. Nobody that I saw at all.

Q. They was all alone?

A. Yes, sir.

Q. The oldest one was how old?

A. I taken him to be 6 or 7 years old.

Q. A little boy?

A. Yes, sir.

Q. How old was the other?

A. It was younger than him; it was a little girl; I would have taken her to be 5 years old, somewhere along there.

Q. They was all alone when you got there?

A. Yes, sir; that is, all I saw.

Q. When you went off and come back where did you see the children then?

A. I don't remember of noticing the children any more.

Q. Do you know whether the children were left there alone by the father that night; do you know?

A. No, sir; I don't.

* * * * * * *

563 REBUTTAL.

ED. BERNEY.

Q. I believe you stated that you were one among a number of parties who did the tracking of the parties who were supposed to have killed Box. I will ask you whether either one of these defendants assisted?

(COUNSEL FOR DEFENDANTS. We object to this testimony; they both say they did not assist in the tracking.)

Q. You know where they were at that time—the day that old man Box lay a corpse; that morning—the time you was tracking these parties around there investigating?

A. I don't know where they were at all the time. I believe that
564 Boutwell assisted in making the investigation. Filmore was there at Box's sometime during the morning. I saw him again after that at Bob Boutwell's house; he went over to his house with me.

Q. That was in the morning. Do you know where he was at in the evening?

A. It seems to me that he was back at Box's in the afternoon.

Cross-examination:

Q. Filmore was not there when you did the tracking?
A. He was there as we come back.
Q. You went with him from there over to Bob Boutwell's house?
A. Yes, sir.
Q. That evening he went back down to Box's and went off to get a burial outfit?
A. Yes, sir.
Q. John went to get old man Rose to help make a coffin?
A. I don't know.
Q. John helped dig the grave?
A. I don't know.
Q. You say Bob Boutwell helped make the coffin?
A. Yes, sir.

* * * * * * *

569 Be it further remembered that after the argument of counsel the court delivered to the jury his charge, which is in words and figures as follows, to wit:

Gentlemen of the jury, this indictment was filed in this court on the 7th of May, 1891, charging the defendants J. C. Ball, M. F. Ball, and R. E. Boutwell, in Pickens County, Chickasaw Nation, I. T., on the 26th day of June, made an assault upon Wm. T. Box with a gun loaded with gunpowder and lead/en bullets, and that by means of said assault that the defendants M. F. Ball, J. C. Ball, and R. E. Boutwell, did unlawfully, feloniously, and with malice aforethought kill and murder said Wm. T. Box. The indictment charges substantially that the murder was committed by the use of a gun, a deadly weapon, and by firing the contents of said gun in and upon the person of Wm. T. Box with the intent of the defendants then and there to kill and murder him, and as a result of such assault he was then and there killed and murdered.

The defendants have been arraigned and entered a plea of not guilty, which places the burden of proof upon the Government to establish their guilt by legal evidence to your satisfaction beyond a reasonable doubt. But if a reasonable doubt arises, you will resolve it in their favor and acquit them. But if no such reasonable doubt arises from the whole evidence it is equally your duty to convict them.

570 Before instructing you particularly upon the questions of law as to murder, I will instruct you upon the special pleas pleaded in this case. M. F. Ball has filed a plea to the jurisdiction of this court, which states in substance that he was married to a daughter of Wm. T. Box; that Box had married an Indian woman living in the Indian country, and as a result of such marriage was the daughter whom he had married, and that consequently under the treaty between the Indians and the U. S. this court was without jurisdiction to try him. The evidence offered before you first is the marriage license issued in Cooke County, Texas, which authorizes the marriage of Miss Lucy Box, the lady that Filmore Ball afterwards claims to have married, and one Mayfield. Mrs. Mayfield, or Mrs. Ball, testified that she had never been divorced from Mayfield; that she had lived with Mayfield from the time of marriage until a few months prior to her attempted marriage with the defendant Filmore Ball.

The defendant Filmore Ball introduces a marriage license, issued in the Chickasaw Nation, signed by the county judge, and filed properly there,

and that the evidence attending it shows that the marriage had been performed between him and Mrs. Mayfield. You are instructed that if you believe from the evidence that Wm. T. Box, the man that was killed, was a white man living in the Chickasaw Nation, and that he married an Indian woman, and as a result of such marriage was the lady that
571 married Mayfield or Ball or both, and you believe from the evidence that she was not married to Mayfield, or that if she had been married to him that she was divorced from him, or he was dead at the time of her marriage to Filmore Ball, in that event you are instructed that the court would not have jurisdiction to try Filmore in this cause. But if you believe from the testimony that she married Mayfield, and that she was not divorced from him at the time of her attempted marriage to Filmore Ball, or that Mayfield was not dead, or if he was living at the time of the attempted marriage to Filmore Ball occurred and not divorced from Mayfield, in that event the marriage with Filmore Ball would be a nullity, on account of her disability to contract the marriage relations, and the court would have jurisdiction, and you would find against his plea to the jurisdiction of the court on that ground. If you believe from the testimony that she married Mayfield, and that she had not been divorced from him, or Mayfield was not dead at the time she attempted to marry Filmore Ball, in that event you are instructed that the marriage with Filmore Ball would be a nullity and the jurisdiction of the court would adhere. If you find that Mrs. Mayfield at the time of her attempted marriage to Filmore Ball was divorced from Mayfield, in that event the marriage would be lawful and the court would be without jurisdiction to try him. As to which way you believe will be your finding.

572 The defendant Filmore Ball has further pleaded that he has been tried heretofore in this court on an indictment charging him with the murder of Box, and was acquitted. The facts are admitted that he was so tried, and he pleads former acquittal in bar of this prosecution. Upon that plea you are instructed that the Supreme Court of the U. S. has decided that the indictment was defective in so far it attempted to charge the offense of murder, and the defendants' plea of former acquittal would not be good and you would find against him; in other words, parties indicted upon a defective indictment could not plea a former conviction or acquittal, and you are instructed to find against that plea.

The defendants J. C. Ball and R. E. Boutwell have filed a plea that they were tried in this court under an indictment that was good for an assault with intent to kill and were found guilty of this offense, and consequently the court no longer has jurisdiction to try them for murder, because they say they have been convicted of a lower degree, and therefore cannot be again convicted for murder. You will find against that plea for the reason the Supreme Court held the indictment bad for murder and do not say that it charged an assault to murder, and you are instructed to find against that plea. I believe those are the special pleas. I don't think I have omitted any. I think I have referred to all the special pleas.

Gentlemen, in regard to these 3 parties here charged together as principals, you are instructed that all parties that are present at the time
573 of the commission of an offense, at the time the offense is committed and who are acting together in order to effect a common pur-

pose, as applies to this case, in the taking of the life of Box, all parties that were present and acting together, each knowing the unlawful intent of the other, are principals and can be prosecuted and convicted as such. Bare presence is not sufficient; it must be the guilty knowledge of the intent of the parties that makes the parties principals when he is present. To illustrate, if A and B are present and each knowing the unlawful intent of the other—that is, to take the life of a certain party—A is the party that actually does the killing, commits the overt act, if B was present, knowing the unlawful intent, and aided, encouraged, or abetted the other party in the commission of the offense, he is as guilty as the party that committed the offense.

An accessory before the fact is one not present when the offense is committed, but he is one who counsels or has counseled or abetted or advised another party to commit an offense. To illustrate, I advise A to kill B—I counsel him to do it, I urge him to do it. He goes off to Clarksville and kills him; I am not present; in that case I am an accessory before the fact, and can not be prosecuted and convicted as principal; I was not present. I could be prosecuted and convicted with evidence sufficient as an accessory before the fact, but not as principal. But by the term pres-
574 ence it does not mean necessarily actual presence; it may mean constructive presence. If three parties have agreed to rob a store, one goes into a store for the purpose of committing the actual robbery; another party is stationed 2 blocks away to keep watch; another in another direction, 2 blocks away, to keep watch. If the 3 parties have agreed upon the commission of the offense, and at the time the offense was committed each party was doing some act in furtherance of the carrying out of the purpose and common design, although not actually present at the time of the commission of the offense, he could be prosecuted and convicted as principal. In applying these principles to Filmore Ball, as to whether or not he is principal, if guilty at all, or whether accessory before the fact, depends upon what you believe from the evidence in this case.

If you believe from the testimony in this case that Filmore Ball, J. C. Ball, and R. E. Boutwell had previously agreed upon the killing of old man Box, and had agreed that R. E. Boutwell and J. C. Ball would go and kill him while the dance was going on, and that Filmore would stay there and keep the crowd at the house for the purpose of concealing or preventing the parties from dispersing and coming in conflict with them, or apprehending or hearing the shooting or things of that kind, and you believe that was a part of the agreement or understanding, in that event you are instructed that Filmore would be a principal as much as the
575 others. But if you should believe from the testimony that he had encouraged, advised, or desired these parties to commit the offense, yet if you believe from the evidence that he was not acting in the common purpose or common understanding between the parties, although he might know they had gone for the purpose of killing old man Box, yet if at the time the act was done he was doing nothing that was a part of the scheme or understanding between the parties, he would not be a principal, but an accessory before the fact, and could not be prosecuted and convicted under this indictment. It depends upon your belief in that phrase of the case.

Murder is the intentional and unlawful taking of human life with malice aforethought, either expressed or implied, and under circumstances

which the law neither excuses nor reduces to a lower grade. In the Federal courts on a charge of murder the party is either guilty of murder, he is guilty of manslaughter or justifiable homicide. The killing then must be unlawful, it must be intentional, and under circumstances which the law neither excuses nor justifies. Malice is the distinguishing feature of murder. It means a wicked, depraved condition of the mind. It means a design to take life, clearly formed, and in pursuance of such formed design the act is done. It is sometimes said to be killing upon express malice, others, upon implied malice; these terms differ only by
576 reason of the proof that is offered. If the party lays in wait for his victim in order to take his life, or if he cooly prepares poison and administers it for the purpose of taking life, these are instances of killing upon express malice, because the facts surrounding the transaction shows a cooly formed design. In cases of that character it is said to be killing upon express malice. Of course, I do not mean to say a killing may not occur under other circumstances upon express malice; whenever the facts in any case shows the killing to be the result of malice or a formed design, it is a killing upon express malice. But if the facts surrounding the homicide shows that the killing was done by the parties charged, and the evidence shows it was not justifiable nor not reducable to manslaughter, yet the evidence fails to disclose the motive why the parties committed the act, then the law implies malice from the nature of the act done, to wit, the taking of human life without justifiable cause. A killing upon express or implied malice in this court is murder. It is admitted by both the defendants' counsel and the Government that whoever took the life of Wm. T. Box is guilty of murder, because the evidence surrounding the transaction shows that he was waylaid and assassinated without excuse and without justification. It is admitted by both sides that it was a case of murder. Therefore I can dispense with the long and liberal illustration of when it is murder and when manslaughter or justifiable homicide. This is simply a case of assassination, and
577 whoever did it is guilty of murder.

Therefore, you are instructed that if you believe from the evidence in this case that the defendants M. F. Ball, J. C. Ball, and R. E. Boutwell acted together in the commission of this offense at any time previous to the 7 day of May, 1891, in pursuance of such understanding took the life of Box, or that it was taken by either of them, as to such parties as were immediately present, they would be principals and could be convicted as such. As to Filmore Ball, if you believe from the evidence that he acted in pursuance of a formed design and understanding between him and the other defendants, and while the act was being committed was then doing some act in the furtherance of such unlawful crime for the purpose of aiding them in the commission of the offense and protecting them against detection, he would be a principal and could be convicted as such; but if you believe that he had advised or urged or solicited the other defendants to commit the offense and was not present at the time and was not doing any act in order to aid and encourage and protect them in the commission of the offense at the time it was done, in that event he would be an accessory before the fact and could not be convicted under this indictment charging him as principal. It is purely a matter of belief in this case. It is one of circumstantial evidence. By that I mean no witness saw the

deed done. In cases of circumstantial evidence the rule of law is
578 that the circumstances that are relied upon to establish or secure a conviction must be consistent with each other; they must be consistent with the other circumstances, and they all must be consistent with the defendant's guilt, and they must be inconsistent with any other reasonable conclusion except the guilt of the party charged. By that I mean that the circumstances surrounding the transaction are of such a character and so conclusive in their nature as to satisfy the minds of the jurors beyond a reasonable doubt that the party charged and no other person did the act. That is what is meant by the rule.

Therefore, you are instructed that the defendants are entitled to every reasonable doubt; you are instructed that the evidence in this case being circumstantial in its character; if the circumstances taken from the evidence offered by the Government, and that offered by the defendant, in considering it as a whole, it generates full conviction in your mind as to the guilt of the parties, a reasonable doubt does not exist. But if a reasonable doubt does exist, and if the doubt originated in the evidence itself, a doubt arises from the testimony that causes you to halt, be uncertain as to which of the 2 conclusions are correct, a reasonable doubt exists, and you will find it in favor of the defendant.

The defendants are presumed to be innocent until their guilt is established by legal evidence to your satisfaction beyond a reasonable
579 doubt. By the terms of a reasonable doubt I mean simply that when 12 honest men are seeking to find out the truth about a disputed question or fact, whenever the evidence satisfies them fully, when it satisfies them to the extent that they would act upon it in the most important affairs in life, those concerning themselves personally, and when they did act act with confidence, a reasonable doubt does not exist, and you would convict them, but if from the whole evidence or a part of it such doubt arises that in matters of great importance to yourself personally you would fail to act, or if you did act would act with diffidence, in doubt, uncertain, in that case a reasonable doubt does exist, and you would find it in favor of the defendants, if such is your state of mind from the evidence offered.

You are the sole and exclusive judges of the weight of the evidence and the credibility of the witnesses. I have neither desire nor disposition to comment upon the testimony offered either upon the part of the Government or the defendant. It has taken some 20 hours to introduce the testimony, and consumed some 12 hours in argument of this case; you have had this case rehearsed from both standpoints, the standpoint of the Government and that of the defendant; there has been lengthy arguments on both sides, giving the jury all the assistance possible. I desire you to give this case that careful, intelligent, and absolute impartial investigation that the character of the case demands; you understand and
580 appreciate the importance to yourself to find a correct verdict.

It is not a position to be sought for, but you are placed in that position, therefore it is your duty as honest citizens to consider well the evidence offered by the Government and that by the defendant, not being influenced by anything said that would sway you from the faithful performance of your duty, being governed by the questions of law that I have given you; whatever may be your verdict, conscientiously found, let it be so written.

You have a right to convict all of the defendants or acquit them all; you can convict some and acquit some; if you disagree as to any of them, so specify in your verdict.

In the finding, gentlemen, it is necessary to call your attention to these special pleas: In regard to Filmore Ball's plea to the jurisdiction of this court, in the event you find he was lawfully married to Mrs. Mayfield, or Mrs. Ball, whatever you may call her—she has been married 3 times—if you find his plea thereon true, your finding as to him would be "We, the the jury, find the plea of the defendant M. F. Ball to the jurisdiction of the court to be true," and make no further finding as to him. But if you find against him upon that plea, the form of your verdict would be, "We, the jury, find against the plea of the defendant Filmore Ball filed in this case," and then specify your finding as to it. If you find the defendants not guilty, it is not necessary to make any findings about the
581 pleas; if you find them not guilty, the form of your verdict will be, "We, the jury, find the defendants M. F. Ball, J. C. Ball, and R. E. Boutwell not guilty of the murder of old man Box in the Indian country as charged in the indictment;" date it and sign it by your foreman. If you find any of the defendants guilty, then find upon the special pleas that have been offered in that finding. If you find in favor of M. F. Ball's jurisdiction plea to this court, the plea of jurisdiction of this court as to his citizen-ship to be true, then you would make no other finding as to him. But if you find against his plea to the jurisdiction of this court, and you find him and the other defendants guilty, the form of your verdict will be, "We, the jury, find the defendants M. F. Ball, J. C. Ball, and R. E. Boutwell guilty of murder in the Indian country as charged in the indictment, and we find against their special pleas filed in this court;" date it and sign it by your foreman. If you find against the plea of Filmore to the jurisdiction of this court, and believe that he was an accessory before the fact, in that event your verdict would be, "We, the jury, find the defendants J. C. Ball and R. E. Boutwell guilty of murder in the Indian country, and find against their special plea, and we find that M. F. Ball was an accessory before the fact and not a principal;" date it and sign it by your foreman; so as to make your finding intelligible, whatever it might be.

582 Be it further remembered that the defendant M. F. Ball, before the jury retired to consider their verdict, presented to the court his special charges Nos. 1, 2, 3, and asked that the same be given to the jury as the law of this case, which said special charges are in words and figures, viz:

1. If you believe from the testimony in this case that the defendant M. F. Ball is the same M. F. Ball named in indictment No. 3 introduced in evidence herein, and that a jury duly selected, empannelled, and sworn to try him upon said indictment returned a verdict of not guilty against said M. F. Ball, and if you further believe from the testimony in this case that the said M. F. Ball was charged in indictment No. 3 with the same transaction and offense as charged in the indictment in this case, i. e., if you believe that he, the said M. F. Ball, was charged in said indictment No. 3 with the shooting, wounding, killing, and murdering of Wm. T. Box in Pickens County, Chickasaw Nation, Indian Territory, and if you further believe that Wm. T. Box was dead at the time said indictment

No. 3 was returned against said M. F. Ball, and that that fact was known to the Government's prosecuting officer who drew said bill of indictment No. 3 at the time he so drew the same, then you are charged that the said M. F. Ball has been once placed in jeopardy for the shooting, wounding, assaulting, killing, and murdering of Wm. T. Box, and you will find the defendant M. F. Ball's plea of former jeopardy and former acquit-
583 tal to be true, and find him not guilty upon the indictment herein.

2nd. You are instructed that under the evidence and admissions in this case the defendant M. F. Ball has been heretofore tried and acquitted of the killing and murdering of Wm. T. Box, and by a valid judgment of this court discharged of said offense, which said judgment has been in no way set aside, annul'ed, or otherwise vacated or appealed from, you will therefore find the said M. F. Ball's plea of former acquittal and former jeopardy to be true, and acquit him herein.

3rd. If you believe from the testimony in this case that the deceased, Wm. T. Box, was a recognized citizen of the Chickasaw Nation at the time he was killed, and that he had prior to that time married a Chickasaw Indian woman under the laws of that tribe of Indians, and if you further believe that he, the said Wm. T. Box, was residing in said Chickasaw Nation at the time he was so killed, and if you further believe from the testimony that the defendant M. F. Ball, prior to the time the said Wm. T. Box was killed, had also married a Chickasaw Indian woman, and was recognized by the Chickasaw government as a member of their tribe by virtue of said marriage with said Indian woman, and if you further believe that he was so recognized at the time Wm. T. Box was killed, and that at that time he, the said M. F. Ball, was residing in the Chickasaw Nation, Indian Territory, then you are charged that this court would not have jurisdiction to try the said M. F. Ball for the
584 offense charged in the indictment herein, and you will find his plea to the jurisdiction of the court to be true.

But the court failed and refused to give said special charges to the jury as the law of this case, to which judgment and ruling of the court each of the defendants at the time excepted.

Be it further remembered that the defendants J. C. Ball and R. E. Boutwell, before the jury retired to consider of their verdict, presented to the court their special charge No. 4, and asked that the same be given to the jury as the law of this case, which said special charge is in words and figures, viz: "If you believe from the testimony in this case that the defendants J. C. Ball and R. E. Boutwell are the same identical J. C. Ball and R. E. Boutwell charged in indictment No. 3 introduced in evidence herein, and if you further believe that said indictment No. 3 charged the said J. C. Ball and R. E. Boutwell with the same transaction and offense as the indictment herein charges them with, i. e., the shooting, wounding, assaulting, killing, and murdering of Wm. T. Box in the Chickasaw Nation, Indian Territory, and if you further believe from the testimony that at the time said indictment No. 3 was returned against said defendants that the grand jury that returned the same, and the Government's officer who drew said indictment No. 3, knew that Wm. T.
585 Box was dead at the time they so drew said indictment, and that he died from the infliction of the gunshot wound charged to have been inflicted by these defendants, and if you further believe that said defendants

were arraigned, tried, and convicted upon said indictment No. 3 by a jury duly selected, empannelled, and sworn, then I charge you that the defendants J. C. Ball and R. E. Boutwell were each charged in said indictment No. 3 with an assault to kill and murder the said Wm. T. Box, and that the Government of the U. S., through its officers aforesaid, by presenting in this court said indictment No. 3, carved out of the shooting and wounding, killing and murdering, of Wm. T. Box a lesser offense than murder, to wit, assault to commit murder, and by the empanneling and swearing the jury to try said defts. upon said indictment, and in requiring said defendants to plead thereto, the Government has waived its right to prosecute said defendants for the crime of murder, and is now estopped from claiming a conviction in this case for any offense higher than an assault to murder, and you will therefore find the special plea of the defendants, pleading former jeopardy and former conviction, to be true.

But the court failed and refused to give said special charge to the jury as the law of this case, to which judgment and ruling of the court each of the defendants at the time excepted.

586 Be it further remembered that after the jury in this case had retired to consider of their verdict and after they had been deliberating for several days, and while the defendants were in jail and not present in the court room, the said jury came to open court and through their foreman requested that the court have to the stenographer to read from her notes in their presence and hearing the testimony of the witnesses H. H. Kirkpatrick and Toney Herz. The court remarked to said jury that he would have the stenographer extend the testimony of said witnesses from her notes and inform*ed* them when the same had been done. The court had said stenographer make a typewritten copy of the testimony of said witnesses from her notes and presented the same to J. C. Hodges, one of the attorneys for the defendants in this case, and the said Hodges agreed that the court might deliver the same to the jury. The court thereupon had all the defendants brought into court but did not ask their permission to deliver said typewritten testimony to the jury or inform either of them that he was going to deliver the same to the jury. Thereupon he had said jury brought to the bar of the court, and without the knowledge or consent of either of the defendants, except through their attorney, J. C. Hodges, as afore said, delivered to said jury the testimony of said witnesses in typewriting so extended by the stenographer from her notes as aforesaid, and the jury took the same and again retired with said testimony to consider of their verdict and in a very short time there-

587 after the said jury returned into court a verdict of guilty against each of these defendants.

There was no objection made by either of the defendants or their attorneys to the action of the court in this behalf, and when the said jury came to the bar of the court and reported that they had agreed upon a verdict one of the defendants' attorneys, J. C. Hodges, then arose and stated to the court that the defendants demanded that the jury be furnished with a copy of the testimony of the witnesses H. H. Kirkpatrick and Toney Herz, and when the court informed counsel that the jury had been furnished with the same, the said Hodges then remarked that that was all right.

Be it further remembered that on the 5th day of May, A. D. 1894, the said jury returned into court the following verdict, to wit: "We, the jury,

find against the special plea of the defendant M. F. Ball as to the jurisdiction of the court, and we further find against the special plea of defendants M. M. Ball, J. C. Ball, and R. E. Boutwell as to former trial; and we, the jury, find the defendants M. F. Ball, J. C. Ball, and R. E. Boutwell guilty of murder in the Indian country as charged in this indictment.

"D. R. BLAIR, *Foreman.*"

MAY 5, '94.

And thereupon the court made and entered the following judgment upon said verdict, to wit: "It is therefore, considered by the court that
588 the defendants M. F. Ball, J. C. Ball, and R. E. Boutwell, each and all of them, are guilty of murder as charged in the indictment and as found by the jury, and it is ordered that they be remanded to the custody of the marshal to await the judgment and sentence of the court."

Be it further remembered that on the 6th day of June, A. D. 1894, the defendants M. F. Ball, J. C. Ball, and R. E. Boutwell filed herein, under leave of the court, their amended motion in arrest of judgment herein, which said motion is in words and figures as follows, to wit: (See pages 34 to 36 of this record.)

Which said motion in arrest of judgment was by the court overruled, to which judgment and ruling of the court each of the defendants at the time excepted.

Be it further remembered that on said 6th day of June, A. D. 1894, the defendant M. F. Ball filed herein, under leave of the court, his amended motion for a new trial, which said motion is in words and figures as follows, to wit: (See pages 37 to 53 of this record.)

And on the same day and date the defendants J. C. Ball and R. E. Boutwell filed herein, under leave of the court, their amended motion for a new trial herein, which motion is in words and figures as follows, to wit: (See pages 54 to 56 of this record.)

Be it further remembered that when each of said motions came
589 on to be heard the following evidence was produced before the court, to wit:

A certified copy of the marriage certificate issued by the clerk of Cooke County, Texas, showing that S. C. Mayfield was married to Louisa Rogers before he married Miss L. O. Box, which said certified copy is hereinbefore set out in full.

The affidavit of W. L. Keller which was attached to M. F. Ball's amended motion for a new trial, which said affidavit is hereinbefore set out in full.

A certified copy of the record of the district court of Cooke County, Texas, showing that Louisa Mayfield instituted in said district court of Cooke County, Texas, on the day of January, A. D. 1878, a suit for a divorce against S. C. Mayfield, and that said suit remained on the docket of said district court of said county up to the 12th day of February, A. D. 1883, when the said suit was dismissed for the want of prosecution.

It was admitted upon the hearing of said motion, by the Government and each of the defendants, that Drumgoole Williams was in charge of the jury who tried these defendants from the time they were empanneled until they returned a verdict of guilty against these defendants; that the said Drumgoole Williams had no special oath administered to him as bailiff of said jury, and that the only oath ever administered to him was an oath as

a deputy United States marshal for the eastern district of Texas
590 many months before the trial of this cause commenced. It was further agreed and admitted upon the hearing of said motions for new trial that the court instructed the jury in this case that they must not separate, must not talk to each other, and must not allow themselves to be talked to by any party on the outside about this case.

The following oral testimony was then introduced under and by the permission of the court, to wit:

* * * * * * *

675 To all of which rulings, sentence, and judgment of the court, the defendants, M. F. Ball, J. C. Ball, and R. E. Boutwell, each at the time excepted in open court, gave notice of appeal to the Supreme Court of the United States of America, and each of said defendants now here tenders this, his bill of exceptions, and prays that the same be signed and sealed by the court, filed herein, and made a part of the record in this case, all of which is accordingly done.

This July 14th, 1894.

DAVID E. BRYANT,
Judge presiding at said trial.

(Endorsed:) No. 230. United States vs. M. F. Ball et al. Bill of exceptions. Filed July 14, 1894. C. Dart, clerk. By H. H. Kirkpatrick, deputy.

666 In the circuit court of the United States, in and for the eastern district of Texas, holding sessions at Paris, Texas.

THE UNITED STATES)
vs.) No. 230.
M. F. BALL ET AL.)

And now comes M. F. Ball, J. C. Ball, and R. E. Boutwell, the defendants in the above entitled and numbered cause, and presents to the court this, their petition, and pray that the court make and enter of record herein and order allowing each of them sixty days after the adjournment of the present term of this court within which to make and file with the clerk hereof their petition for a writ of error to the Supreme Court of the United States of America and their assignment of errors.

And as in duty bound they will ever pray, etc.

HODGES & NICHOLS,
Attorneys for the Defendants,
M. F. Ball, J. C. Ball, and R. E. Boutwell.

(Endorsed:) No. 230. United States vs. M. F. Ball et al. Petition for 60 days to file writ of error and assignment of error by defendants. Hodges & Nichols, attys. for defts. Filed July 14, 1894. C. Dart, clerk. By H. H. Kirkpatrick, deputy.

667 Saturday, July 14, 1894.

Court met pursuant to adjournment. Present and presiding, Hon. D. E. Bryant, judge. Also present, Hon. R. E. Hannay, U. S. attorney; J. S. Williams, U. S. marshal, and C. Dart, clerk. By H. H. Kirkpatrick, deputy.

* * * * * * *

THE UNITED STATES } 230.
v.
M. F. BALL ET AL. }

Upon motion of the defendants sixty days from this date are allowed to them, and each of them, in which to apply for a writ of error in this cause to the Supreme Court of the United States.

In the circuit court of the United States for the eastern district of Texas, fifth circuit.

UNITED STATES
vs.
M. F. BALL, J. C. BALL, and R. E. Boutwell, } No. 230. Murder.

To the judges of the circuit court of the United States in and for the eastern district of Texas, at Paris, Texas.

668 Your petitioners, M. F. Ball, J. C. Ball, and R. E. Boutwell, represents that heretofore, to wit, on the 7th day of May, A. D. 1891, they were indicted by a grand jury of the United States, duly selected, empaneled and sworn, in the eastern district of Texas, at Paris, Texas, for the offense of murder, alleged to have been committed in the Chickasaw Nation, Indian Territory; that your petitioners were tried in the circuit court of the United States in and for said eastern district of Texas upon said indictment, and a jury returned into said court on the 5th day of May, A. D. 1894, a verdict of guilty as charged against each of your petitioners; that thereafter, to wit, on the 14th day of July, A. D. 1894, the court pronounced and entered against each of your petitioners its judgment, adjudging each of them guilty of murder and sentencing each of your petitioners be executed on the 28th day of September, A. D. 1894, by the marshal of said eastern district of Texas as a penalty for said crime, in the rendition of which judgment, sentence, and proceedings there was and is error.

Your petitioners further represent that at the term of the court at which they were so tried, convicted, and sentenced, the court made and entered of record in this case an order allowing your petitioners sixty days next after the expiration of said term of court within which to file herein their petition for a writ of error to the Supreme Court of the United States and within which to file their assignment of errors,
669 which said sixty days have not yet expired.

Your petitioners further represent that they have already filed in this cause their assignment of errors and here present a copy of the same for the inspection of the court.

Wherefore your petitioners, M. F. Ball, J. C. Ball, and R. E. Boutwell, each pray that they be granted a writ of error to remove said judgment, sentence, and proceedings had in said circuit court to the Supreme Court of the United States of America, for a revision and reversal of said judgment, and they pray that the sentence of death heretofore entered agains'

each of them in this case be suspended to await the action of said Supreme Court, and they pray for citation as the law directs.

JACOB C. HODGES and
A. J. NICHOLS,
Attorneys for Petitioners, M. F. Ball, J. C. Ball, and R. E. Boutwell.

Writ of error allowed, the record to be prepared and forwarded as required by the rules of the Supreme Court, and no bond required.

DAVID E. BRYANT, *Judge.*

PARIS, TEXAS, *Sept.* 1, 1894.

(Endorsed:) No. 230. United States vs. M. F. Ball et al. Petition for writ of error. Filed Sept. 1, 1894. C. Dart, clerk. By H. H. Kirkpatrick, deputy.

670 *Assignment of errors.*

In the circuit court of the United States in and for the eastern district of Texas, fifth circuit, holding sessions at Paris, Texas.

UNITED STATES *vs.* M. F. BALL, J. C. BALL, and R. E. Boutwell.	No. 230. Murder.

And now on this 20th day of August, A. D. 1894, and within sixty days after the adjournment of the April term, A. D. 1894, of said circuit court, comes M. F. Ball, J. C. Ball, and R. E. Boutwell, the defendants in the above entitled and numbered cause, and files this, their assignment of errors, and say that on the trial of said cause in the trial court there were numerous errors committed to the great injury of each of said defendants, which errors were duly complained of by each of these defendants, and which are manifest in the record of this cause in this, to wit:

I.

The court erred in overruling these defendants' amended motion in arrest of judgment, filed herein on the 6th day of June, A. D. 1894,
671 and in not setting aside the judgment entered against the defendants and in not quashing the indictments upon which these defendants were tried and convicted, because said indictment charges no crime under the laws of the United States, will not support the verdict of the jury finding them each guilty of murder and the judgment of the court adjudging them each guilty of that offense, and because said indictment is fatally defective in this:

First. Said indictment fails to allege upon what part of the body of deceased the fatal wounds were inflicted and fails to give any description of said fatal wounds.

Second. Said indictment fails to allege that deceased, Wm. T. Box, died of the wounds charged to have been inflicted upon his body by these defendants.

Third. Said indictment fails to allege that the deceased, Wm. T. Box, was killed by these defendants, or either of them, at a place within the sole and exclusive jurisdiction of the United States.

Fourth. Said indictment fails to allege facts sufficient to show that the circuit court of the United States in and for the eastern district of Texas, at Paris, Texas, had jurisdiction to try these defendants, or either of
672 them, for the killing and murdering of deceased, Wm. T. Box, in that it does not aver that the deceased, Wm. T. Box, or either of these defendants were not, at the time said deceased was killed, members of any tribe of Indians in the Indian Territory by marriage or adoption, but simply avers that these defendants were not citizens of the Indian Territory.

Fifth. Said indictment fails to allege that the deceased, Wm. T. Box, died within the jurisdiction of the circuit court in and for the eastern district of Texas.

II.

The court erred in refusing to first try the special plea of the defendant M. F. Ball to the jurisdiction of the court, before these defendants were required to announce ready upon the merits of the case (which said special plea is made a part of the record herein, here referred to, and made a part hereof), because by submitting said special plea to the jury, together with the other issues in the case, there was created before said jury a multiplicity of issues, was liable to mislead and confuse them, and, by hearing all of the facts, prejudice them against the said M. F. Ball, and thereby influence said jury in finding against his said special plea.

III.

The court erred in sustaining the motion made by the district attorney to strike out the special plea of former jeopardy and former
673 acquittal of the defendant M. F. Ball filed herein on the 25th day of April, A. D. 1894, which said special plea and motion to strike out the same are made parts of the record herein, here referred to and made a part hereof, because said special plea showed that the said defendant M. F. Ball had, before the indictment in this case had been presented in this court, been legally tried by a jury duly and legally empanneled in a court of competent jurisdiction, to wit, in the circuit court of the United States in and for the eastern district of Texas, at Paris, Texas, for the same offense charged against him in this cause, to wit, for the shooting, wounding, killing, and murdering of Wm. T. Box, and by said jury found not guilty of said offense, and by said court discharged by its judgment entered of record.

IV.

The court erred in sustaining the motion made by the district attorney to strike out the special plea of former jeopardy and former conviction of the defendants J. C. Ball and R. E. Boutwell filed herein on the 25th day of April, A. D. 1894, which said special plea and motion are made parts of the records in this case, here referred to, and made a part hereof,

because said special plea of said defendants showed that the matters charged in indictment No. 3, presented to the circuit court of the United States, eastern district of Texas, and the matters charged in the indictment in this case, are for one and the same transaction and offense, to wit: For the shooting, assaulting, killing, and murdering Wm. T. Box; that at the time said indictment No. 3 was presented against said defendants in
674 said court the Government's prosecuting officer and the grand jury that returned the same knew that Wm. T. Box was dead; that the Government through its duly constituted grand jury and prosecuting officer had and did by the finding and presenting of said indictment No. 3 in said circuit court in and for the eastern district of Texas (which said indictment No. 3 is a part of the record in this case, here referred to, and made a part hereof) against the said defendants J. C. Ball and R. E. Boutwell carved out of the shooting, assaulting, killing, and murdering of said Wm. T. Box a lesser offense than that of murder—that is to say, the Government, through its said grand jury and prosecuting officer, carved out of said shooting, assaulting, killing, and murdering of Wm. T. Box, by the presentation of said indictment No. 3 in said court, the offense of an assault to kill and murder the said Box, and upon said indictment No. 3 the said defendants J. C. Ball and R. E. Boutwell were placed upon trial in said circuit court before a jury duly selected, empanneled, and sworn, and a verdict of guilty of said offense returned against them by said jury, upon which a judgment of said court was pronounced and entered against them, adjudging them, the said J. C. Ball and R. E. Boutwell, guilty of said offense, and said defendants thereby placed once in jeopardy and the Government thereby barred from prosecuting them for the crime of murder.

675 V.

The court erred in overruling the written motion of the defendant M. F. Ball, filed herein before this case was called for trial, asking that he, the said M. F. Ball, be awarded a separate trial from his co-defendants J. C. Ball and R. E. Boutwell, which said motion is made a part of the record in this case, here referred to, and made a part hereof, and in forcing the said M. F. Ball to be tried jointly with his co-defendants, because said motion stated facts sufficient to entitle the said M. F. Ball to a separate trial in this case.

VI.

The court erred in overruling the written motion of the defendants J. C. Ball and R. E. Boutwell, filed herein before this case was called for trial, asking that they be awarded a separate trial from their co-defendant M. F. Ball, and in forcing them to be tried jointly with their said co-defendant M. F. Ball because said motion, which is made a part of the record in this cause and here referred to, stated facts sufficient to entitle them to a separate trial in this cause.

VII.

The court erred in sustaining the objection of the district attorney and in preventing these defendants from proving by the Government witness

Joe Cross how much money he and Ed. Berney (both of whom were material witnesses for the Government in this case) had paid or promised
676 to pay Mr. Owenby for his services in assisting the district attorney in the prosecution of this case, because the same was a legitimate inquiry upon the trial of this cause, in that it tended to show the interest and feeling of said witnesses in this prosecution.

VIII.

The court erred in permitting the Government to prove upon the trial of this cause, over the objection of these defendants, by the Government witness Ed. Berney that he, the said Ed. Berney, and Joe Cross had not employed private counsel to assist in the prosecution of this case on account of any ill-feeling they had towards either of these defendants, but that they had employed said counsel because Wm. T. Box, the deceased, was a warm personal friend of theirs, a next-door neighbor, and because they had known him for 20 or 25 years; because the same was an attempt upon the part of the Government and tended to prove that the deceased was a revered and honored citizen, when neither of these defendants had put his character in issue, and was therefore calculated to prejudice the jury against these defendants charged with his murder.

IX.

The court erred in permitting the Government to prove by its witness Maggie Freeman, over the objection of these defendants, that she heard the tallest one of these defendants say, while all of these defendants were under arrest, "that if it had not been for those old boots they never
677 would have suspected them of killing deceased," because the proper predicate had not been laid authorizing the admission of said testimony.

X.

The court erred in admitting in evidence, over the objection of these defendants, a certified copy of a marriage license under the hand and seal of the clerk of Cooke County, Texas, showing that S. C. Mayfield married Lucy O. Box prior to the time she married the defendant herein M. F. Ball (which said certified copy was made a part of the record herein and here referred to), because the Government thereby proved the contents of a written instrument by substitutionary evidence without showing the loss or destruction of the original, and because said marriage license, or a certified copy thereof, was not endorsed upon the back of the indictment against these defendants, and because they had no notice whatever that the Government would offer said marriage license or a certified copy thereof in evidence against them, and because said marriage license raised an issue in this case, to wit, the validity of the marriage of M. F. Ball with Lucy O. Box, alias Lucy O. Mayfield, which these defendants, and especially the said M. F. Ball, was not prepared to meet, and did not know would be raised upon the trial of this cause.

XI.

678 The court erred in allowing Mrs. L. O. Angling to testify, over the objection of these defendants, that "she thought she was legally married to one of these defendants, to wit, M. F. Ball, but had learned since that she was not legally married to him, and that at the time she so married the defendant M. F. Ball her former husband, C. S. Mayfield, was living; that she had never been divorced from him, and that the defendant M. F. Ball knew that said Mayfield was living at the time she so married the said M. F. Ball," because the said M. F. Ball, prior to the time said witness so testified, introduced in evidence in this case a marriage license, issued by the legal authorities of the Chickasaw Nation, Indian Territory, showing that he, the said M. F. Ball, had, prior to the time Wm. T. Box was killed, married the said witness, and said witness testified, prior to the time said evidence was introduced, that she married the said M. F. Ball under said license and lived with him as his wife up to the time her father, Wm. T. Box, was killed, and that she had never been divorced from him, and was therefore not a competent witness in this case.

XII.

There was prejudicial error committed by Robert E. Hannay, the United States district attorney who conducted the prosecution against these defendants, wherein he, the said Hannay, asked Charles Hahn, a material witness for these defendants, upon cross-examination, and in the presence and hearing of the jury, "Have you ever been in the penitentiary?
679 How much money did you get for coming down here as a witness for these defendants? How much money have you been promised for coming down here and testifying for these defendants?" because said questions, so propounded to said witness, was an intimation from the Government's said officer to the jury that in the opinion of said officer said witness had been in the penitentiary and that said witness had been paid by these defendants or their friends, or had been promised pay, to come to court and testify falsely for these defendants, and thereby greatly impairing the testimony of said witness before the jury.

XIII.

The court erred in refusing to require the officers of the Government to deliver to these defendants or some other competent person the gun introduced in evidence, for the purpose of testing the said gun as to the manner in which it would shoot "low-mould" buckshot, because said gun was the property of the defendant J. C. Ball, but had been in the exclusive possession of the Government's officials since shortly after the killing of Wm. T. Box in 1889; defendants made said request before they closed their case; it was an admitted fact that the deceased, Wm. T. Box, was killed with a shotgun loaded with "low-mould" buckshot, held by someone at a distance of 8 or 10 feet away; that the shot penetrated his body from his shoulder to his hips; the Government witness Blunt
680 testified that the gun in court, and the property of the defendant J. C. Ball would scatter "low-mould" buckshot badly; defendant J. C. Ball testified that he never shot low-mould buckshot from said gun.

The fact as to how said gun would shoot "low-mould" buckshot was a material enquiry in this case, and a practical and thorough test of said gun would have accurately settled the disputed question as to whether said gun fired the shot that killed Wm. T. Box, as claimed by the Government, or whether it did not fire said shot, as contended by these defendants.

XIV.

The court erred in admitting in evidence against these defendants, and especially against the defendant' J. C. Ball and R. E. Boutwell, over the objections of these defendants, the testimony of Mrs. Rider, who testified in substance as follows: "After the killing on the morning of June 27th, 1889, M. F. Ball (Filmore) told me that they were going to arrest him, but that he did not care, as he could prove out of it; that there were two men who staid all night with him by whom he could prove where he was; that they could not prove anything against him, and that they never would dream of John Ball and Bob Boutwell doing such a thing; that they would take him and try him, but as they could not prove anything against him, they would turn him loose. He said he did not see what they were tracking around for; that they could make nothing out of tracks;
681 that he was perfectly satisfied that the tracks would exactly fit J. C. Ball and R. E. Boutwell, but so far as his tracks were concerned he was not afraid of it; he said he did not see why Joe Cross and Ed. Berney were dishing in so deep for; it was none of their business. He asked me how many shots they took out of old man Box's body. I told him, and then he said that he had shot the other load out of J. C. Ball's gun at some chickens and loaded the gun with fresh shot, and he wanted to know of me if I thought they would still think J. C. Ball's gun killed deceased. He said they were going to lay it off on an old woman there. He then told me that if he could he would call the old man back this morning as free as he ever done anything in his life. I told him it was too late. He then asked me if I had noticed anyone down there eyeing and watching him; I told him I did not, but I did see them. He asked me if he looked bad; I told him he did not; he said that he saw everybody there eyeing him all the time. He told me over a time or two about Berney and Cross tracking around there, and said if it had not been for them tracking around so much that they never would have been bothered."

And in admitting, over the objection of these defendants, the testimony of J. T. Hoover, who testified in substance as follows: "After the other trial and after M. F. Ball was acquitted, I had a conversation with him about this case. He asked me something about the boys, John Ball and
682 Boutwell. He asked me if I knew anything about them and how they were getting along. I told hom no, but that they were in pretty bad shape, I guessed. He said, 'I guess the boys will not hang;' I said, 'I hope not if they are not guilty,' I told him he ought to do all he could for them, and he said he done about all he could do. I said something about the people thinking that they were all guilty of killing old man Box; he said the people could think and be damned; that so far as he was concerned he could go up and admit that he did kill deceased; that it did not make a damn bit of difference now, as he had come clear and they could not try him for it any more."

Because the same was a declaration made by one of the defendants, M. F. Ball, after the homicide was committed, and was not made in the presence or hearing of the defendants J. C. Ball and R. E. Boutwell, or either of them, and the same was calculated to mislead the jury and prejudice them against said J. C. Ball and R. E. Boutwell.

XV.

Because the court erred in failing and refusing to give to the jury the special charges, No. 1 and 2, asked by the defendant M. F. Ball, and which said special charges are as follows:

1. If you believe from the evidence in this case that the defendant M. F. Ball is the same M. F. Ball named in indictment No. 3, introduced in evidence herein, and that a jury duly selected, empannelled, and
683 sworn to try him upon said indictment returned a verdict of not guilty against said M. F. Ball, and if you further believe from the testimony in this case that the said M. F. Ball was charged in said indictment No. 3 with the same transaction and offense as charged in the indictment in this case, i. e., if you believe that he, the said M. F. Ball, was charged in said indictment No. 3 with the shooting, wounding, killing, and murdering of Wm. T. Box in Pickens County, Chickasaw Nation, Indian Territory, and if you further believe that Wm. T. Box was dead at the time said indictment No. 3 was returned against said M. F. Ball, and that that fact was known to the Government's prosecuting officer who drew said bill of indictment No. 3, at the time he so drew the same, then you are charged that the said M. F. Ball has been once placed in jeopardy for the shooting, wounding, assaulting, killing, and murdering of Wm. T. Box, and you will find the defendant's, M. F. Ball's, plea of former acquittal to be true and find him not guilty upon the indictment herein."

"2nd. You are instructed that under the evidence and admissions in this case, the defendant M. F. Ball has been heretofore tried and acquitted of the killing and murdering of Wm. T. Box and by a valid judgment of this court discharged of said offense, which said judgment has been in no way set aside, annul'ed, or otherwise vacated or appealed from; you will therefore find the said M. F. Ball's plea of former acquittal and former jeopardy to be true and acquit him herein."

684 And the court erred in his general charge, wherein he charged the jury in this case as follows, to-wit:

"The defendant Filmore Ball has further pleaded that he has been tried heretofore in this court on an indictment charging him with the murder of Box, and was acquitted. The facts are admitted that he was so tried, and he pleads former acquittal in bar of this prosecution. Upon that plea you are instructed that the Supreme Court of the United States has decided that the indictment was defective in so far as it attempted to charge the offense of murder, and the defendant's plea of former acquittal would not be good, and you would find against him. In other words, parties indicted upon a defective indictment could not plead a former conviction or acquittal, and you are instructed to find against that plea."

Because it was admitted upon the trial of this cause that the offense charged in indictment No. 3, returned into the circuit court of the United States in and for the eastern district of Texas, at Paris, Texas, on the 17th

day of October, A. D. 1889, by a grand jury duly empannelled in said court, which said indictment is made a part of the record in this cause and here referred to, and indictment No. 230, returned into said court on the 7th day of May, A. D. 1891, and upon which these defendants have been tried and convicted in this case, is for one and the same transaction and offense—that is to say, for the killing and murdering of Wm. T. Box
685 by the defendants herein, M. F. Ball, J. C. Ball, and R. E. Boutwell, and that the said M. F. Ball, J. C. Ball, and R. E. Boutwell named in said indictment No. 3 are the same M. F. Ball, J. C. Ball, and R. E. Boutwell named in indictment herein, No. 230, and not other and different parties; and the uncontroverted evidence in the case, which was admitted without objection from the Government, showed conclusively that the defendant M. F. Ball was tried in this court upon said indictment No. 3, and acquitted of said offense prior to the time indictment No. 230 herein was returned against him, and he, said M. F. Ball, placed once in jeopardy of life and liberty and acquitted of said offense in a court of competent jurisdiction and by a judgment of said court, made and entered, discharged.

XVI.

The court erred in refusing to give to the jury the 3rd special charge asked by the defendant M. F. Ball, which is as follows:

"3rd. If you believe from the testimony in this case that the deceased, Wm. T. Box, was a recognized citizen of the Chickasaw Nation at the time he was killed, and that he had prior to that time married a Chickasaw Indian woman under the laws of that tribe of Indians; and if you further believe that he, the said Wm. T. Box, was residing in said Chickasaw Nation at the time he was so killed; and if you further believe from the testimony that the defendant M. F. Ball, prior to the time said Wm. T. Box was killed,
686 had also married a Chickasaw Indian woman and was recognized by the Chickasaw Government as a member of their tribe by virtue of said marriage with said Indian woman; and if you further believe that he was so recognized at the time Wm. T. Box was killed, and that at that time he, the said M. F. Ball, was residing in the Chickasaw Nation, Indian Territory, then you are charged that this court would not have jurisdiction to try the said M. F. Ball for the offense charged in the indictment herein, and you will find his plea to the jurisdiction of the court to be true."

And the court erred in his general charge when he charged the jury as follows: "M. F. Ball has filed a plea to the jurisdiction of this court, which states in substance that he was married to the daughter of Wm. T. Box; that Box had married an Indian woman living in the Indian country, and as a result of such marriage was the daughter whom he had married, and that consequently, under the treaty between the Indians and the United States, this court was without jurisdiction to try him. The evidence offered before you first is the marriage license issued in Cooke County, Texas, which authorizes the marriage of Miss Lucy Box, the lady that Filmore Ball afterwards claims to have married, and one Mayfield. Mrs. Mayfield, or Mrs. Ball, testified that she had never been divorced from Mayfield; that she had lived with Mayfield from the time of mar-
687 riage until a few months prior to her attempted marriage with the defendant, Filmore Ball. The defendant Filmore Ball introduces

a marriage license, issued in the Chickasaw Nation, signed by the county judge and filed properly there, and that the evidence attending it shows that the marriage had been performed between him and Mrs. Mayfield. You are instructed that if you believe from the evidence that Wm. T. Box, the man that was killed, was a white man living in the Chickasaw Nation, and that he married an Indian woman, and as the result of such marriage was the lady that married Mayfield, or Ball, or both, and you believe from the evidence that she was not married to Mayfield, or that if she had been married to him that she was divorced from him, or he was dead at the time of her marriage to Filmore Ball, in that event you are instructed that the court would not have jurisdiction to try Filmore in this case. But if you believe from the testimony that she married Mayfield, and that she was not divorced from him at the time of her attempted marriage to Filmore Ball, or that Mayfield was not dead, or if he was living at the time of the attempted marriage to Filmore Ball occurred and not divorced from Mayfield, in that event the marriage with Filmore Ball would be a nullity, on account of her disability to contract the marriage relations, and the court would have jurisdiction, and you would find against his plea to the jurisdiction of the court on that ground."

688 Because the testimony in the case showed that the deceas'd, Wm. T. Box, and the defendant M. F. Ball were each members of the Chickasaw tribe of Indians in the Indian Territory at the time the homicide was committed and that they each resided there at the time Wm. T. Box was killed, and because the court in his general charge to the jury submitted to them for their determination the validity of the marriage of Lucy O. Box to C. S. Mayfield and the marriage of Lucy O. Box or Mayfield to the defendant M. F. Ball, without any proof having been made of the laws of the Chickasaw Nation governing marriages and divorces in said Chickasaw Nation.

XVII.

The court erred in refusing to give to the jury the special charge No. 4 asked by the defendants J. C. Ball and R. E. Boutwell, which said special charge is as follows:

"4th. If you believe from the testimony in this case that the defendants J. C. Ball and R. E. Boutwell are the same identical J. C. Ball and R. E. Boutwell charged in indictment No. 3 introduced in evidence herein, and if you further believe that said indictment No. 3 charged the said J. C. Ball and R. E. Boutwell with the same transaction and offense as the indictment herein charges them with, i. e., the shooting, wounding, assaulting, killing, and murdering of Wm. T. Box in the Chickasaw Nation Indian Territory, and if you further believe from the testimony that at the time said indictment No. 3 was returned against said defend-

689 ants that the grand jury that returned the same and the Government's officer who drew said indictment No. 3 knew that Wm. T. Box was dead at the time they so drew said indictment and that he died from the infliction of the gunshot wound charged to have been inflicted by these defendants, and if you further believe that said defendants were arraigned, tried, and convicted upon said indictment No. 3 by a jury duly selected, empanneled, and sworn, then I charge you that the defendants J. C. Ball and R. E. Boutwell were each charged in said indictment No.

3 with an assault to kill and murder the said Wm. T. Box, and that the Government of the U. S., through its officers aforesaid, by presenting in this court said indictment No. 3, carved out of the shooting and wounding, killing, and murdering of Wm. T. Box a lesser offense than murder, to wit, assault to commit murder, and by the empanneling and swearing the jury to try said defendants upon said indictment and in requiring said defendants to plead thereto, the Government has waived its rights to prosecute said defendants for the crime of murder and is now estopped from claiming a conviction in this case for any offense higher than an assault to murder, and you will therefore find the special plea of said defendants, pleading former jeopardy and former conviction, to be true."

And the court erred in his general charge to the jury, wherein he charged the' as follows: "The defendants J. C. Ball and R. E. Boutwell have filed a plea that they were tried in this court under an indict-
690 ment that was good for an assault with intent to kill and were found guilty of this offense, and consequently the court no longer has jurisdiction to try them for murder, because they say they have been convicted of a lower degree and therefore can not be again convicted for murder. You will find against that plea for the reason the Supreme Court held the indictment bad for murder and do not say that it charged an assault to murder, and you are instructed to find against that plea."

Because it was admitted upon the trial of this cause that the offense charged in indictment No. 3 returned into the circuit court of the United States in and for the eastern district of Texas on the 17th day of October, A. D. 1889, by a grand jury duly empanneled in said court, which said indictment is made a part of the record in this cause, and here referred to and made a part hereof, and indictment No. 230 returned into said court on the 7th day of May, A. D. 1891, and upon which these defendants have been tried and convicted in this case, is for one and the same transaction and offense, that is to say, for the killing and murdering of Wm. T. Box by the defendants herein; that the M. F. Ball, J. C. Ball, and R. E. Boutwell named in the indictment No. 3 are the same M. F. Ball, J. C. Ball, and R. E. Boutwell named in the indictment herein, No. 230, and are not other and different persons, and the uncontroverted evidence in this case, which was admitted without any objection being made
691 thereto, shows that the defendants J. C. Ball and R. E. Boutwell were tried upon said indictment No. 3 in the circuit court of the United States in and for the eastern district of Texas, at Paris, Texas, and convicted of the offense therein charged, prior to the time indictment No. 230 herein was returned into said court; that the Government's officer who drew said indictment No. 3 knew at the time he drew the same, and the grand jury was aware at the time they returned the same into this court, that the said Wm. T. Box was dead at that time, and that he died from the infliction of the gunshot wounds charged to have been inflicted upon him by these defendants; that said indictment No. 3 charged these defendants with an assault to kill the said Wm. T. Box, and the Government, by the presenting of said indictment No. 3, carved out of the offense of shooting, wounding, assaulting, killing, and murdering of said Box the lesser offense of assault to kill and murder, and was thereby estopped from presenting against these defendants indictment No. 230 herein, charging them with the higher crime, to wit, murder.

XVII.

The court in his charge to the jury committed a fundamental error as to the defendants J. C. Ball and R. E. Boutwell, in failing to charge the jury that the declarations of the defendant M. F. Ball as testified to by the Government witness' J. T. Hoover and Mrs. Rider, admitted
692 over the objections of these defendants, could only be considered by them in passing upon the guilt or innocence of the defendant M. F. Ball, and should not be considered by them in passing upon the guilt or innocence of the defendants J. C. Ball and R. E. Boutwell, because said declarations of said M. F. Ball to said Hoover and Mrs. Rider were objected to by defendants at the time the same was offered in evidence, and the testimony shows that said declarations were made by said M. F. Ball after the killing of Wm. T. Box, and that they were made by him, the said M. F. Ball, in the absence of the defendants J. C. Ball and R. E. Boutwell.

XIX.

The court erred in permitting the jury, after this case had been submitted to them, to come into court during the absence of all of these defendants and demand from the court the reproduction of the testimony of H. H. Kirkpatrick and Tony Hertz from the notes of the stenographer, and in telling the jury, in the absence of these defendants, "I will have the stenographer to extend the testimony from her notes and will let you know when I get it ready." And the court erred in having said testimony extended from the stenographer's notes in typewriting, and in delivering the same so extended to the jury after this case had been submitted to them, without the knowledge or consent of either of these defendants or their attorneys, because said typewritten copy of the testimony of
693 said witnesses, so delivered to the jury by the court, was not verified by the oath of said stenographer, and the court, by delivering said typewritten testimony to the jury, presented to said jury other and further testimony for their consideration after the case had been submitted to them, and he thereby presented to said jury said testimony in the absence of these defendants, thereby denying them the right of cross-examining said witnesses, and the court thereby presented to said jury other and further testimony in a manner and from a source not authorized by law and in violation of the Constitution of the United States, guarranteeing that in criminal prosecutions the accused shall be confronted with the witnesses against him.

XX.

These defendants have not been convicted by due process of the law of the land in this: The jury that returned the verdict of guilty against the defendants in this case was not placed in charge of a duly sworn bailiff of this court after they were empaneled and charged with this case until they returned a verdict of guilty against these defendants, but, upon the contrary, said jury was in the exclusive control of Drumgoole Williams from the time they were empannelled until they returned their said verdict, without any oath whatever being administered to him, the said Drumgoole Williams, as such special bailiff, all of which will be made appar-
694 ent by an inspection of the record in this cause, here referred to and made a part hereof.

XXI.

These defendants have not been convicted by due process of the law of the land in this: The jurors who tried and convicted these defendants were not kept together after they were empanneled and sworn to try this case until they returned a verdict herein, but, upon the contrary, said jury was permitted to separate each night from the time they were so impanneled until they returned their verdict herein; that the members of said jury during the entire trial of this cause, and after the same had been submitted to them, and while they were deliberating upon their verdict, occupied five different rooms of the Lamar Hotel at nights and slept therein, and were each night separated from each other; that in addition to occupying said five different rooms each night as aforesaid, on the last two nights and while said jury was deliberating upon this case, the foreman thereof, D. R. Blair, occupied a cot in an open hallway at said hotel, leading to one of the main thoroughfares in the city of Paris, Texas, without any bailiff, officer, or fellow juror being with him, all of which fully appears from the record in this case, here referred to and made a part hereof.

XXII.

695 These defendants have not been legally convicted by due process of the law of the land and have not had a fair and impartial trial by a jury of their peers in this: The jury that tried these defendants, while they were deliberating upon their verdict, received at the hands of the United States marshal in and for the eastern district of Texas, and at his expense, intoxicating liquors in such quantities as was reasonably calculated to deprive the members thereof of that mental discretion a case of this magnitude demands, and was well calculated to bias said jury in favor of the Government in this case, all of which fully appears from the record in this case, here referred to and made a part hereof.

XXIII.

The court erred in not granting the defendant M. F. Ball a new trial on account of the newly discovered evidence of J. L. Keeler, the marriage license of C. S. Mayfield to Louisa Rodgers, and a certified copy of the record of the divorce proceedings of Louisa Mayfield vs. C. S. Mayfield, had in the district court of Cooke County, Texas, all of which fully appears in the record in this case, here referred to and made a part hereof; because said defendant M. F. Ball had no notice prior to the trial of this cause that the Government would introduce in evidence the marriage license of C. S. Mayfield and Lucy O. Box, the wife of said defendant, and in that way attempt to show that said defendant M. F. Ball was not legally married to Lucy O. Box, alias Mayfield, a Chickasaw Indian woman, and thereby establish the fact that this court had jurisdic-
696 tion to try said M. F. Ball, and because said newly discovered evidence showed conclusively that said M. F. Ball was lawfully married to said Lucy O. Box, alias Mayfield, and the deceased being a member of the Chickasaw tribe of Indians, this court did not have jurisdiction to try the said M. F. Ball for murdering said deceased.

XXIV.

The court erred in admitting, over the objection of these defendants, the testimony of the witnesses Robert L. Boyd, Judge Overton, Mrs. Burris, H. H. Burris, H. B. Turner, J. B. H. O'Neal, and Judge Love upon the hearing of these defendants' motion for a new trial, which said testimony tended to prove that the deceased, Wm. T. Box, was a white man and not a member of any tribe of Indians in the Indian Territory, by reason of the fact that he, the said Wm. T. Box, had a living wife at the time he married a Chickasaw Indian woman, because, 1st, said testimony absolutely contradicted and changed the testimony of the Government adduced upon the trial of this cause, in that the Government's proof showed conclusively upon the trial that Wm. T. Box was a citizen of the Chickasaw Nation, Indian Territory, and a member of the Chickasaw tribe of Indians. 2nd. Because the indictment against these defendants does not aver that the said Wm. T. Box was a white man and not a citizen of the Indian Territory and not a member of any tribe of Indians in said Indian Territory, and no notice was given these defendants
697 that the Government claimed jurisdiction over them by reason of Wm. T. Box being a non-citizen of the Indian Territory. 3rd. Because the Government, by the production of said testimony, is attempting to get the court to pass upon a question of fact which these defendants have a right to be determined by a jury, to wit, the citizenship of Wm. T. Box, the deceased. 4th. Because the said testimony was hearsay, and was an attempt upon the part of the Government to prove a valid marriage between Wm. T. Box and Sarah A. Munninghan by parties who did not see them married, without producing a marriage license or any other legal evidence to establish that fact.

XXV.

The court erred in overruling the seventeenth (17) ground in the motion for a new trial made by the defendant M. F. Ball, which is as follows, to wit: "Because the verdict of the jury finding this defendant guilty of the murder of Wm. T. Box is contrary to the law as given in charge by the court, is contrary to the evidence adduced, and is without evidence to support it in this: The testimony conclusively shows that if this defendant is guilty of any offense he is guilty as an accessory and not as a principal offender in the killing of Wm. T. Box."

XXVI.

The defendant M. F. Ball has not been tried by due process
698 of the law of the land in this: He was indicted, tried, convicted, and sentenced to death upon an indictment charging him, the said M. F. Ball, with being a principal offender in the killing and murdering of Wm. T. Box, when all of the evidence, which is made a part of the record in this case, here referred to and made a part hereof, shows conclusively that *that* the said M. F. Ball was not present when the said Box was killed; that he, the said M. F. Ball, was doing no act at the time said Box was killed in furtherance of a common design of these defendants or any one else to kill deceased; but the testimony shows conclusively

that the said M. F. Ball, at the very time the shot was fired that killed deceased, was at a house a half a mile away playing a fiddle for parties at a dance; and said testimony shows that the said defendant M. F. Ball was not a principal offender in the killing of said Box, but if guilty of any offense he was guilty as an accessory to said killing.

XXVII.

The court erred in overruling the eighteenth ground in these defendants' motion for a new trial, which is as follows, to wit: "Because all of the evidence, taken to be absolutely true, does not establish the guilt of these defendants beyond a reasonable doubt and to a moral certainty.

XXVIII.

The court erred in overruling the twentieth ground in defend-
699 ants' motion for a new trial, which is as follows, to wit: "Because the verdict of the jury is contrary to the law as given in charge by the court and evidence adduced in this: the evidence fails to show that the deceased, Wm. T. Box, was killed within the jurisdiction of this court, or that he died from the infliction of the wounds claimed to have been inflicted by these defendants within the jurisdiction of this court.

All of which errors operated to the prejudice and injury of each of these defendants.

Wherefore the said M. F. Ball, J. C. Ball, and R. E. Boutwell, on account of the errors committed against them on the trial of this cause, as set out above, prays that the said judgment of the circuit court of the eastern district of Texas, adjudging them each guilty of murder and sentencing them to be executed, be reversed.

JACOB C. HODGES and A. J. NICHOLS,
Attorneys for the Defendants, M. F. Ball, J. C. Ball, and R. E. Boutwell.

(Endorsed:) No. 230. United States vs. M. F. Ball, J. C. Ball, and R. E. Boutwell. Assignment of errors. Filed Sept. 1st, 1894. C. Dart, clerk. By H. H. Kirkpatrick, deputy.

700 In the United States circuit court, eastern district of Texas, 5th circuit.

UNITED STATES
vs.
M. F. BALL, J. C. BALL, and R. E. Boutwell. } No. 230. Murder.

Now comes the defendants M. F. Ball, J. C. Ball, and R. E. Boutwell, and on account of the errors committed against each of them in the trial of this cause, as shown and pointed out in their assignment of errors, prays for a reversal of the judgment rendered against them in this cause, and for a suspension of the sentence of death pronounced against each of

them by said court until said errors are reviewed and passed upon by the Supreme Court of the United States of America.

JACOB C. HODGES and A. J. NICHOLS,
Attorneys for the Defendants, M. F. Ball, J. C. Ball, and R. E. Boutwell.

(Endorsed:) No. 230. United States vs. M. F. Ball et al. Prayer for reversal. Filed Sept. 1, 1894. C. Dart, clerk. By H. H. Kirkpatrick, deputy.

701 UNITED STATES OF AMERICA, ss.

The President of the United States, to Robt. E. Hannay, attorney of the United States for the eastern district of Texas, greeting:

You are hereby cited and admonished to be at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Texas, wherein M. F. Ball, John C. Ball, and R. E. Boutwell are plaintiffs in error and the United States are defendants in error, to show cause, if any there be, why the judgment and sentence rendered against the said plaintiffs in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this first day of September, in the year of our Lord one thousand eight hundred and ninety-four.

[SEAL.] DAVID E. BRYANT,
U. S. Judge, E. Dist., Texas.

Attest:
C. DART,
Clerk U. S. Circuit Court, Eastern District of Texas,
By H. H. KIRKPATRICK, *Deputy.*

On this first day of September, in the year of our Lord one thousand eight hundred and ninety-four, personally appeared before me, the subscriber, deputy marshal of the United States for the eastern district of Texas, and makes oath that he delivered a true copy of the within citation to Robt. E. Hannay, attorney of the United States for the eastern district of Texas, at Paris, in the eastern district of Texas, on the first day of September, 1894.

W. E. BROWNE,
Dep. U. S. Mar.

Sworn to and subscribed the first day of September, A. D. 1894.

[SEAL.] C. DART,
Clerk U. S. Circuit Court, Eastern District of Texas,
By H. H. KIRKPATRICK,
Deputy.

(Indorsed:) No. 230. Criminal docket. United States circuit court, eastern district of Texas, at Paris. M. F. Ball et al. vs. The United

States. Citation in error. Issued September 1, 1894. Returned and filed 1st day of September, 1894. C. Dart, clerk. By H. H. Kirkpatrick, deputy.

702 I, C. Dart, clerk of the circuit court of the United States in and for the eastern district of Texas, do hereby certify that the above and foregoing 701 pages of transcript contain and embrace a true copy of the record, and of the assignment of errors, and of all proceedings in the case of M. F. Ball, J. C. Ball, and R. E. Boutwell, defendants (plaintiffs in error), against The United States, plaintiff (defendant in error).

To certify which, witness my hand and the seal of the circuit court of the United States, at Paris, in said district, this 24 day of September, A. D. 1894.

[SEAL.] C. DART, *Clerk*,
By H. H. KIRKPATRICK, *Deputy*.

703 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Texas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between the United States, plaintiff, and M. F. Ball, John C. Ball, and R. E. Boutwell, defendants, a manifest error hath happened, to the great damage of the said defendants as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within 30 days from the date hereof, in the said Supreme Court, to be then and there held, and the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the first day of September, in the year of our Lord one thousand eight hundred and ninety-four.

C. DART,
Clerk of the Circuit Court of the United States for the Eastern District of Texas.
By H. H. KIRKPATRICK,
Deputy.

Allowed by
DAVID E. BRYANT,
U. S. Dist. Judge, Eastern District of Texas.

704 I, C. Dart, clerk of the circuit court of the United States for the eastern district of Texas, hereby certify that I received this writ on the first day of September, 1894, and that on this 24th day of September, 1894, I have transmitted to the clerk of the Supreme Court of the United

States a true copy of the record, and of the assignment of errors, and of all proceedings in the within cause, duly certified under my hand and seal.

Witness my hand and the seal of said court at my office in the city of Paris, the day and date last above written.

[SEAL.] C. DART, *Clerk.*
By H. H. KIRKPATRICK, *Deputy.*

(Indorsed): No. . Docket. United States circuit court, eastern district of Texas, at Paris. M. F. Ball et al. vs. The United States. Writ of error. Filed Sept. 1, 1894. C. Dart, clerk. By H. H. Kirkpatrick, deputy.

705 In the Supreme Court of the United States, October term, 1894.

812
15696

M. F. BALL ET AL.)
v.) No. 812.
THE UNITED STATES.)

STIPULATION.

Now come the plaintiffs in error by their attorney of record, J. C. Hodges, and agree that in printing the record herein all the evidence may be omitted from the record except—

1. The record evidence that was offered upon the trial which is now a part of the record on file in this court.

2. The testimony of witnesses Joe Cross, Bob Blunt, Bud Ashley, Tommy Blunt, George Williams, John Hayes, Nannie Blunt, old man Blunt when recalled, Ed Berney, and Mrs. Rider.

3. The following offered on motion for a new trial:

The testimony of J. L. Kelley.

Exhibit C.

The agreement of the U. S. district attorney.

It is further agreed that the Government introduced testimony tending to sustain all of the averments in the indictment, and all of the facts necessary for conviction, except plaintiffs in error claim the evidence showed M. F. Ball to be an accessory and not a principal. It is further agreed that the charge of the judge may be omitted, except that portion copied in plaintiffs' bill of exception.

JACOB C. HODGES,
Counsel for Plaintiffs in Error.
HOLMES CONRAD,
Solicitor-General.

H.

706 (Indorsed:) Case No. 15696, Supreme Court, U. S. October term, 1894. Term No., 812. M. F. Ball et al., P. E., vs. The United States. Stipulation to omit parts of record in printing. Office Supreme Court U. S. Filed Apr. 13, 1895. James H. McKinney, clerk.

(Indorsement on cover:) Case No. 15696, term No. 812. M. F. Ball, John C. Ball, and R. E. Boutwell, plaintiffs in error, vs. The United States. E. Texas. C. C. U. S. Filed September 28th, 1894.

Office Supreme Court, U. S.
FILED.
JAN 9 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

M. F. BALL, JOHN C. BALL, AND R. E. Boutwell, plaintiffs in error,
v.
THE UNITED STATES.
} No. 461

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

M. F. BALL, JOHN C. BALL, AND R. E. Boutwell, plaintiffs in error,
v.
THE UNITED STATES.
No. 812.

MOTION TO ADVANCE.

The plaintiffs in error were indicted and tried in the circuit court of the United States for the eastern district of Texas, in June, 1889, for the murder of one Wm. T. Box, in Pickens County, Choctaw Nation, in the Indian Territory. M. F. Ball was acquitted, and John C. Ball and Boutwell convicted. On writ of error to this court the judgments were "reversed and the cause remanded, with a direction to quash the indictment, and for such further proceedings in relation to the defendants as to justice may appertain." (See 140 U. S., 118.)

The plaintiffs in error were reindicted for the same offense, and on May 5th, 1894, were convicted, and sentenced on July 14th to be hanged.

The Solicitor-General respectfully moves the court to advance the case upon the docket and set it down for hearing at such day during the present term as may be convenient to the court.

Plaintiffs in error have been notified of this motion, and proof of service has been filed with the clerk.

LAWRENCE MAXWELL, Jr.,
Solicitor-General.

OCT 12 1895
JAMES H. McKENNEY,

IN SUPREME COURT,

FOR THE UNITED STATES OF AMERICA.

OCTOBER TERM, 1895.

No. ~~812~~ 461 - 461

M. F. BALL, J. C. BALL, AND R. E. BOUTWELL,

Plaintiffs in Error,

versus

THE UNITED STATES,

Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF FOR PLAINTIFFS IN ERROR.

By J. C. HODGES,
C. H. SMITH,
A. J. NICHOLS,
Att'ys for Plaintiffs in Error.

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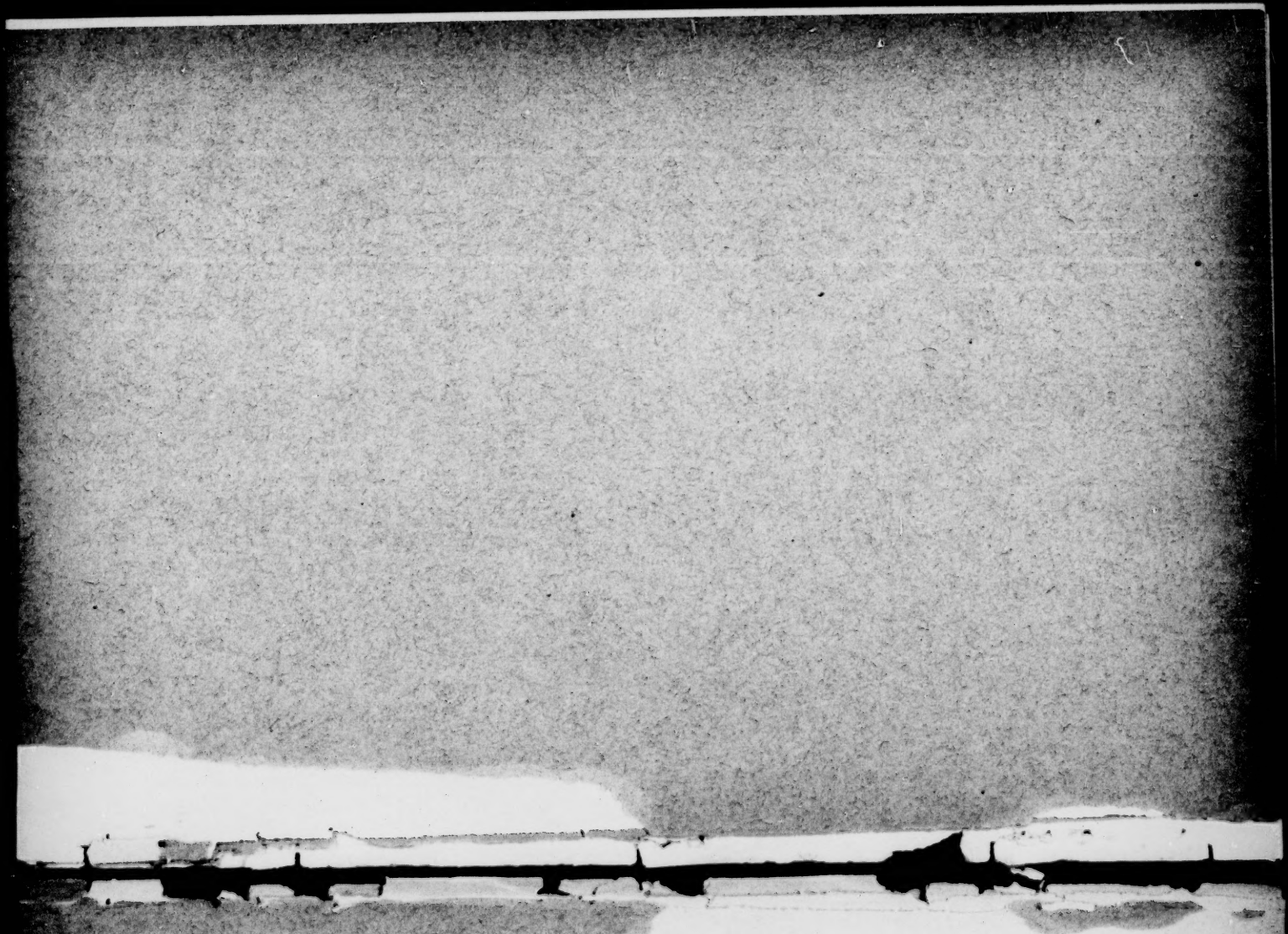

IN SUPREME COURT,

FOR THE UNITED STATES OF AMERICA.

OCTOBER TERM, 1895.

M. F. BALL, J. C. BALL, AND R. E. BOUTWELL,
Plaintiffs in Error,

versus

THE UNITED STATES,
Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

Statement of Case:

M. F. Ball, J. C. Ball and R. E. Boutwell, were, at spring term of the Circuit Court of the United States for the Eastern District of Texas, sitting at Paris, Texas, on May 7th, 1891, indicted by the grand jury of said court for the crime of murder of one William T. Box, on the 26th day of June, 1889, in the Indian Territory.

On the 23d day of April, 1894, M. F. Ball filed a

special plea in answer to said charge in said indictment, which said plea is as follows:

In the United States Circuit Court, Eastern District of Texas.

UNITED STATES
vs. No. 230.
M. F. BALL ET AL.

And now comes M. F. Ball, one of the defendants in the above cause, and for special plea herein says:

First. That heretofore, on or about the 3d day of November, A. D. 1889, he was tried and acquitted at Paris, Texas, in a court of competent jurisdiction, to wit: In the Circuit Court of the United States for the Eastern District of Texas, upon an indictment, numbered 3 in said court, duly and legally presented therein, charging
7 this defendant jointly with J. C. Ball and R. E. Boutwell, with the same identical offense that is charged in indictment No. 230 herein, and upon which he is now called to answer. That indictment No. 3 aforesaid charged this defendant and his co-defendants with the same identical overt acts, i. e., shooting William T. Box, that they are now charged with in indictment No. 230 herein.

Second. That he was duly arraigned and pleaded not guilty to the charge in the said indictment No. 3; that thereupon he was tried before a jury of twelve men, duly and legally elected, empaneled, and sworn to try the issue so joined, in the United States Circuit Court for the Eastern District of Texas, holding session at Paris, Texas, and being the court wherein said indictment was duly and legally presented by a grand jury duly organized by said court.

Third. That on the 3d day of November, A. D. 1889, the jury so selected, empaneled, and sworn, after hearing the evidence and the charge of the court, returned into court the following verdict to-wit: "We the jury find the defendants J. C. Ball and R. E. Boutwell guilty, as charged in this indictment, and we find M. Filmore Ball not guilty. A. P. Ball, foreman, Nov. 3d, 1889." The court received and filed said verdict, and then and there rendered its judgment as follows: "It is
8 therefore ordered by the court that the defendants, J. C. Ball and R. E. Boutwell, are guilty as

charged in the indictment herein and as found by the jury, and it is ordered that they be remanded to the custody of the marshal, and by him committed to the county jail of Lamar county to await the judgment and sentence of the court. It is further ordered that the defendant M. F. Ball be discharged and go hence without day." All of which proceedings appear upon the record of said United States Circuit Court in and for the said Eastern District of Texas, holding sessions at Paris, Texas, a certified copies of said entries are hereto attached, marked "Exhibit A," and made a part hereof; which said judgment was never vacated, annulled, or set aside in any way.

Fourth. Defendant shows to the court that said indictment No. 3 aforesaid was a good and valid indictment, and charged this defendant with the commission of a felony, and in so charging charged this defendant with the same overt acts, to-wit: the shooting of William T. Box, that are charged in the indictment No. 230, to which affiant now pleads.

Wherefore affiant pleads former jeopardy and former acquittal upon the same identical offense charged in the indictment in this cause.

Fifth. Defendant says that if he is mistaken as to the bill of indictment No. 3 as aforesaid, charging him and his co-defendants with the same offense
9 charged in indictment No. 230, and the court should hold that indictment No. 3 only charged this defendant and his co-defendants with assault with intent to kill William T. Box, then this defendant for special plea in this behalf shows to the court that the shooting and wounding William T. Box, charged in said indictment No. 3, is the same identical shooting that is charged in indictment No. 230 and is one and the same transaction; and that the said William T. Box died before the filing of the indictment No. 3 against the defendant and his co-defendants, and which fact was known to the district attorney who drew the bill of indictment and to the grand jury that presented said indictment No. 3, and that by the terms of said indictment this defendant was charged with assault with intent to kill said William T. Box, and was tried in said court and acquitted of said offense of assault to kill and all other offenses charged in said indictment. This defendant therefore charges that the United States, by its legally constituted grand jury, district attorney, and Circuit Court as aforesaid, in the manner aforesaid,

and without the consent of this defendant, carved out of the shooting of William T. Box the offense of an assault to kill, and tried this defendant, of which said offense he was duly and legally acquitted. Wherefore he pleads said acquittal in bar of any further prosecution for the alleged shooting of William T. Box, as charged in said two indictments.

THE STATE OF TEXAS, /
County of Lamar. \

I, M. F. Ball, defendant mentioned above, on oath, say that I am the identical M. F. Ball mentioned in indictments No. 3 and No. 230, presented in the Circuit Court of the Eastern District of Texas, having sessions at Paris, Texas, and that the facts set forth in the above and foregoing plea are true.

M. F. BALL.

Sworn to and subscribed before me this 18th day of April, 1893.

A. D. BROOKS,
Clk. U. S. Dist. Ct., E. D. T.

On the 23d of April, 1894, J. C. Ball and R. E. Boutwell filed special pleas as follows:

THE UNITED STATES /
vs. No. 230.
M. F. BALL ET AL. \

And now come the defendants, J. C. Ball and R. E. Boutwell, herein, and for special plea herein they say:

First. That on the 17th day of October, A. D. 1889, the grand jury for the United States of America, empaneled in the Circuit Court for the Eastern District of Texas, holding sessions at Paris, Texas, returned and presented in said court a bill of indictment, numbered 3, against these defendants and M. F. Ball, charging them jointly with the same overt acts that are charged in the indictment numbered 230, that defendants are now called to answer; a certified copy of said indictment No. 3 is hereto attached marked "Exhibit A" for identification and made a part hereof; that the facts and acts charged in said indictment No. 3 were and are the same identical acts and transaction charged in the indictment No. 230 herein.

Second. On the 30th day of October, A. D. 1889, these defendants and their co-defendant, M. F.
13 Ball, was arraigned and placed on trial in said Circuit Court of the Eastern District of Texas, upon all the charges and offenses charged in said indictment No. 3, as will appear from a certified copy from the record of said court hereto attached, marked "Exhibit B" for identification and made a part hereof.

Third. On the 3d day of November, A. D. 1889, the jury empaneled in said court in said cause returned into court a verdict in words and figures as follows, viz: "We, the jury, find the defendants J. C. Ball and R. E. Boutwell guilty as charged in the indictment, and we find M. Filmore Ball not guilty. Nov. 3d, 1889. A. P. Ball, foreman."

Fourth. Said verdict was received in said cause without any objection from either of the defendants and by the court ordered filed and the jury discharged. Upon the return of said verdict the court then and there entered its judgment in words and figures as follows, to-wit: "It is therefore considered by the court that the defendants J. C. Ball and R. E. Boutwell are guilty as charged in the indictment herein and as found by the jury, and it is ordered that they be remanded to the custody of the marshal and be by him committed to the county jail of Lamar county to await the judgment and sentence of the court. It is further ordered that the defendant M. F. Ball be discharged and go hence without day." All of which is apparent from the record in said cause, certified
14 copies of which are hereto attached, marked "Exhibit C," and made a part hereof.

Fifth. Defendants allege that they were, by virtue of said verdict and judgment or order remanding said defendants to jail to await the judgment and sentence of the court, held in Lamar county jail until the present indictment, No. 230, was presented and filed against these defendants and their co-defendant M. F. Ball, after which time said case number 3 was dismissed without the knowledge or consent of these defendants, and they were then required to give bond to answer the charge in said indictment No. 230.

Sixth. Defendants show to the court that said indictment No. 3, aforesaid, charged these defendants and their co-defendant with unlawfully, and with malice aforethought, shooting and wounding William T. Box; that

said indictment was a good and sufficient indictment, fully charging them and each of them with the offenses of assault with intent to kill; that the shooting and wounding William T. Box, charged in said indictment No. 3, is the same identical shooting and wounding of William T. Box as charged in indictment No. 230 that they are now called upon to answer, and is one and the same shooting, and one and the same time, place, and transaction. That if said William T. Box ever died from gun shot wounds as charged in said indictment No. 230, that he died
15 before the said indictment No. 3 aforesaid was presented, which fact was known to the district attorney who drew the bill of indictment and to the grand jury that presented same before the same was presented; that the facts proved upon the trial of these defendants upon indictment No. 3 showed that Box was dead at the time they were tried on said indictment charging them with an assault with intent to kill William T. Box, by reason of which presentation of said indictment No. 3 and the empaneling and swearing the jury and arraigning these defendants for trial aforesaid, defendants say they were put in jeopardy for the same offense which they are now called to answer; that since the death of the said Willliam T. Box the government, by its legally constituted grand jury and circuit court aforesaid, and without the consent of either of these defendants, carved out of the shooting and wounding of William T. Box the offense of an assault with intent to kill, and tried and convicted these defendants, from which said conviction for an assault with intent to kill these defendants have never appealed; that if the court trying these defendants failed to render judgment upon the verdict of the jury finding these defendants guilty of an asssult with intent to kill as charged in indictment No. 3, it is no fault of these defendants; that they nor either of them has ever objected to a legal judgment being rendered upon said verdict finding defendants guilty as charged in said indictment No. 3.
16 All the objections the defendants ever made to the judgment of the court trying them was to the judgment sentencing them to death, which said judgment was not supported by the indictmont and verdict of the jury; that there is no order or judgment of this court vacating and setting aside said verdict unless the same was vacated and rendered void by the action of this court in dismissing said case No. 3, aforesaid.

Wherefore these defendants plead specially said facts in bar of further prosecution for the alleged shooting and wounding William T. Box, and pray that they be discharged and go hence without day.

Before the undersigned authority personally appeared J. C. Ball and R. E. Boutwell, who each, on oath, for himself says that he is the identical person named in the above and foregoing plea, and who is charged by indictment 230 with the murder of William T. Box; that the facts and allegations stated in said plea are true.

R. E. BOUTWELL.
J. C. BALL.

Subscribed and sworn to before me by each person, this 18th day of April, 1893.

A. D. BROOKS,
Clerk U. S. Dist. Court, E. D. T.

To this plea was attached certified copy of indictment No. 3, and of the order and judgment of the court in case No. 3. (See pages 8, 123 and 24).

To which pleas the district attorney demurred and moved to strike out as follows:

THE UNITED STATES
vs.
M. F. BALL, JOHN BALL, and ROBERT BOUTWELL. | No. 230.

Now comes the United States of America, by
21 and through Robert E. Hannay, United States attorney in and for the Eastern District of Texas, and excepts to the special plea of the defendants filed herein, and moves the court to strike out and hold the same for naught for the following reasons, to-wit:

First. Because the said special plea does not set forth the bill of indictment number 3 referred to therein, and does not set forth the records or any part thereof of the proceedings before the said court based upon said bill of indictment, and does not set forth the motion in arrest of jungment and other records filed in the said cause, and does not set forth the judgment of the Supreme Court in which said indictment is held valid for assault only, and in which said cause was remanded for further proceedings in the said circuit court.

Second. Because the said special plea shoud be made to speak the truth concerning all the proceedings which have been had in the said circuit and the said Supreme courts in the above styled and numbered cause.

Third. Because the said defendants and none of them have been tried in the said circuit court upon a valid indictment for the murder of William T. Box. That the bill of indictment number 3, referred to in the said special plea of the defendants, and upon which the defendants were put to trial was insufficient in law, and was
22 void, and was in form and substance so defective that no valid judgment could have been entered of record in any cause or proceeding based upon said bill of indictment.

Fourth. Because none of the said defendants have been in legal jeopardy by virtue of any proceeding based upon said void, defective, and insufficient indictment, and the said defendants and none of them have been legally tried for the crime of murder, as set out in the indictment filed herein and numbered 230.

Fifth. Because whatever acquital or conviction there may have been in the said former proceeding was void and should go for naught; and further, because no penalty has been inflicted or attempted to have been inflicted upon the said defendants, or either of them, upon any judgment or order of the said circuit court based upon said void proceeding; and further, because no punishment or penalty could have been legally inflicted upon said defendants, or either of them, upon any such order or judgment.

ROBT. E. HANNAY,
U. S. Atty., E. D. T.

23 TUESDAY, May 1st, 1894.

Court met pursuant to adjournment. Presiding and present, Hon. D. E. Bryant, judge. Also present, R. E. Hannay, Esq., U. S. attorney; Frank Lee, Esq., assistant U. S. attorney; J. S. Williams, U. S. marshal, and C. Dart, clerk. By H. H. Kirkpatrick, deputy.

* * * * * * *

THE UNITED STATES
vs. No. 230.
M. F. BALL ET AL.

This day this cause came on to be heard upon the plea

of former acquittal and former jeopardy interposed herein by the defendant M. F. Ball, and the argument of counsel thereon being heard and the court being fully advised, because it is the opinion of the court that the law is against the defendant, the plea is overruled and denied; to which ruling of the court defendant in open court excepted.

THE UNITED STATES /
vs. No. 230.
M. F. BALL ET AL. \

This day came on to be heard the special plea of former jeopardy interposed herein by defendants, J. C. Ball and R. E. Boutwell, and the argument of counsel thereon being heard and the court being fully advised, because it is the opinion of the court that the law is against the defendant, the plea is overruled and
24 denied; to which ruling of the court the defendants in open court excepted.

On the 30th day of April, 1894, M. F. Ball filed a plea to the jurisdiction of the court as follows:

THE UNITED STATES /
vs.
M. F. BALL ET AL. \

And now comes M. F. Ball, one of the defendants in the above-entitled and numbered cause, and says the government ought not further prosecute this cause against this defendant, because he says that the crime charged against this defendant is not an offense against the laws of the United States, and that this court has no jurisdiction to try him for said alleged offense, for the reason that the deceased, William T. Box, and this defendant were each citizens of the Chickasaw Nation and members of the tribe of Chickasaw Indians at the time this offense is alleged to have been committed, and the crime alleged in the indictment was committed, if at all, in the said Chickasaw Nation, Indian Territory.

Wherefore this defendant says that this court has no jurisdiction to try this defendant for the crime charged against him herein, and he prays that he be discharged and go hence without day.

HODGES & NICHOLS, and
J. M. LONG,
Attys. for Deft.

On May 1st plaintiffs in error filed motions praying for a severance, which motions were overruled. (See record, pages 12 and 13).

Plaintiffs in error were forced to trial, which resulted in the conviction of all three for murder.

Motions for new trial and in arrest of judgment were filed and overruled, plaintiffs sentenced to death; plaintiffs in error excepted and filed petition for error, and assigned many errors, some of which we will now consider.

We will consider the assignments of error in their logical order as presented by the record:

III.

Assignment:

The court erred in sustaining the motion made by the district attorney to strike out the special plea of
673 former jeopardy and former acquittal of the defendant M. F. Ball filed herein on the 25th day of April, A. D. 1894, which said special plea and motion to strike out the same are made parts of the record herein, here referred to and made a part hereof, because said special plea showed that the said defendant M. F. Ball had, before the indictment in this case had been presented in this court, been legally tried by a jury duly and legally empaneled in a court of competent jurisdiction, to-wit: in the Circuit Court of the United States in and for the Eastern District of Texas, at Paris, Texas, for the same offense charged against him in this cause, to-wit: for the shooting, wounding, killing and murdering of Wm. T. Box, and by said jury found not guilty of said offense, and by said court discharged by its judgment entered of record.

Statement from the Record:

On the 25th day of June, 1889, William T. Box was waylaid and shot at night in Pickens county, Chickasaw

Nation, Indian Territory, by some unknown party, or parties. On the morning of June 26th, 1889, Box was found dead with several buckshot wounds in his body. On the 17th day of Oct., 1889, the United States grand jury returned a bill of indictment No. 3 into the Circuit Court of the United States, Eastern District of Texas, at Paris, Texas, charging plaintiffs in error with the murder of William T. Box.

On the 30th day of Oct., 1889, M. F. Ball, J. C. Ball and R. E. Boutwell were each arraigned upon said indictment in said court and each entered a plea of not guilty. A jury was empaneled and plaintiffs in error were tried upon said indictment. On the 3d day of Nov., 1889, the jury empaneled in said case No. 3 returned into court the following verdict: "We, the jury, find J. C Ball and R. E. Boutwell guilty as charged in this indictment, and we find M. Filmore Ball not guilty. Nov. 3d, 1889. A. P. Ball, Foreman."

Upon the return of said verdict the court entered the following judgment:

> It is therefore considered by the court that the defendants J. C. Ball and R. E. Boutwell are guilty as charged in the indictment herein and as found by the jury, and it is ordered that they be remanded to the custody of the marshal and be by him committed to the county jail of Lamar county to await the judgment and sentence of the court.
>
> It is further ordered that the defendant M. F. Ball be discharged and go hence without day.

On the 15th of Nov. the court entered the following:

THE UNITED STATES
vs.
J. C. BALL & R. E. BOUTWELL. } 3.

This day this cause coming on to be heard upon the motion of defendants for a new trial herein, because it is the opinion of the court that the law is against the motion the same is overruled.

Friday, November 15th, 1889.—In U. S. Circuit Court, Eastern District of Texas.

THE UNITED STATES
vs.
ROBT. E. BOUTWELL & JOHN C. BALL. } 3.

By reason of the law and the evidence and the verdict of the jury in this case, it is ordered and adjudged that the defendants Robt. E. Boutwell and John C. Ball be executed by being hung until each and either are dead, according to the forms, delays, and processes provided in the laws of the United States.

This done and signed in open court, Nov. 15, 1889.

ALECK BOARMAN, Judge.

On the 18th day of July, 1890, the following order was entered in said case:

This day came the United States, by the United States attorney, and the defendant in his own proper person and by attorney appeared, and the United States attorney moved the court to fix a day of execution of the defendant, John C. Ball, and it appearing to the court that on the 15th day of November, 1889, during a former term of this court, the sentence of death was pronounced upon the defendant John C. Ball, for the crime of murder, in compliance with the law and the verdict of the jury rendered at that term of the court, to-wit: on the third day of November, 1889, and that no petition for writ of error to the Supreme Court of the United States has been filed with the clerk of this court, and no other proper proceedings for a revision of the finding herein by the Supreme Court of the United States have been begun; it is therefore ordered, adjudged and decreed by the court that the defendant John C. Ball be now remanded to the custody of the marshal, to be by him kept securely confined in the

jail of Lamar county, Texas, until Friday, the 19th day of December, 1890, when he shall be taken therefrom by the marshal, and between the hours of 12 o'clock m. and 4 o'clock p. m. of said 19th day of December, 1890, be hanged by the neck until he, the said John C. Ball is dead, and the clerk of this court is ordered to issue a death warrant in accordance with this sentence, and deliver the same to the marshal, who shall execute the same according to law.

Done in open court, July 18th, 1890.

DAVID E. BRYANT, Judge.

As to Robt. E. Boutwell, identically the same order was entered, except as to name of defendant.

This assignment presents the sole question as to whether or not the arraignment and trial of M. F. Ball upon said indictment No. 3 and his acquittal is a defense to the charge preferred in indictment No. 230 in this case.

First Proposition under this Assignment:

Box was shot, wounded and died from the effects of the wounds before indictment No. 3 was presented, which facts were known to the district attorney and grand jury before the bill was presented.

The government, by its legally constituted authority, having arraigned and tried plaintiff in error, M. F. Ball, upon indictment No. 3, and after verdict of not guilty entering a judgment discharging him, is a complete answer to the charge contained in indictment No. 230.

1st. Our contention is that M. F. Ball was legally placed in jeopardy for the offense of shooting and wounding William T. Box, when he, Ball, was arraigned upon indictment No. 3.

2d. That the verdict acquitting him was a legal verdict and the judgment discharging him was and is a valid judgment, and a bar to any further prosecution for any act of M. F. Ball for shooting and wounding William T. Box.

3d. Plaintiffs in error were well charged in indictment No. 3 with the offense of an assault with the intent to kill Box, the indictment being a good one for an offense against the laws of the United States.

Included in the shooting and killing of Box, an offense of which the jury might have found the plaintiffs in error guilty upon a good indictment for murder, the acquittal of M. F. Ball was properly pleaded in bar, and the court erred in striking out the special plea.

Authorities:

1st Wharton's Criminal Law, 541, 554, 563, 565.

Stevens vs. Fassett, 27 Me., page 266.

Com vs. Land, 3 Metc., 328.

Com vs. Miller, 5 Dand., 320.

Jones vs. State, 13 Tex., 138.

State vs. Cooper, 1 Green, N. Y., 361.

State vs. Lewis, 2 Hawks, 98.

1st Herman on Estoppel, Sec. 416.

Craft vs. the People, 15 Hon., 484.

People vs. Neysomchong, 28 American State Report, 129.

People vs. Neysomchong, 9 American State Report, 59.

Wharton's Criminal Evidence, Sec. 143.

1st Bishop's Criminal Law, Sec. 1021.

IV.

The court erred in sustaining the motion made by the district attorney to strike out the special plea of former jeopardy and former conviction of the defendants J. C. Ball and R. E. Boutwell filed herein on the 25th day of April, A. D. 1894, which said special plea and motion are made parts of the records in this case, here referred to, and made a part hereof, because said special plea of said defendants showed that the matters charged in indictment No. 3, presented to the Circuit Court of the United States, Eastern District of Texas, and the matters charged in the indictment in this case, are for one and the same transaction and offense, to-wit: For the shooting, assaulting, killing, and murdering William T. Box; that at the time said indictment No. 3 was presented against said
674 defendants in said court the government's prosecuting officer and the grand jury that returned the same knew that William T. Box was dead; that the government, through its duly constituted grand jury and prosecuting officer, had and did by the finding and presenting of said indictment No. 3 in said circuit court, in and for the eastern district of Texas, (which said indictment No. 3 is a part of the record in this case, here referred to, and made a part hereof) against the said defendants J. C. Ball and R. E. Boutwell carved out of the shooting, assaulting, killing, and murdering of said Wm. T. Box, a lesser offense than that of murder—that is to say, the government, through its said grand jury and prosecuting officer, carved out of said shooting, assaulting, killing, and murdering of Wm. T. Box, by the presentation of said indictment No. 3 in said court, the offense of an assault to kill and murder the said Box, and upon said indictment No. 3 the said defendants J. C. Ball and R. E. Boutwell were placed upon trial in said circuit court before a jury duly selected, empaneled, and sworn, and a verdict of guilty of said offense returned against them by said jury, upon which a judgment of said court was pronounced and entered against them, adjudging them, the said J. C. Ball and R. E. Boutwell, guilty of said offense, and said defendants thereby placed once in jeopardy and the government thereby barred from prosecuting them for the crime of murder.

This assignment presents for determination the legal

effect of the conviction of plaintiffs in error, J. C. Ball and R. E. Boutwell, of the offense charged in indictment No. 3. The assignment sufficiently presents the propositions we make.

We submit: 1st. That indictment No. 3 charged plaintiffs in error with an asault with intent to kill William T. Box. It may be claimed that as the indictment was not a good one for murder that therefore it was not good for an assault with the intent to kill. Such a position is not tenable. The indictment No. 3, after charging, "did unlawfully, fraudulently and feloniously, and with their malice aforethought, and with a certain deadly weapon, to-wit: a certain gun in the hands of the said M. F. Ball, J. C. Ball and R. E. Boutwell, then and there held, made an assault in and upon the body of one William T. Box, with said gun held as aforesaid, said gun being then and there loaded and charged with gunpowder and leaden balls, then and there held and used as aforesaid, the said M. F. Ball, J. C. Ball and R. E. Boutwell did shoot off and discharge the contents of said gun in and upon the body of the said William T. Box, inflicting thereon ten mortal wounds, of which mortal wounds the said William T. Box did languish and languishing did die." Said grand jury further charged: "And so the grand jurors upon their oaths aforesaid, do say that upon the day aforesaid, at the place aforesaid, with said deadly weapon aforesaid, in the manner aforesaid, and used as aforesaid, did unlawfully and feloniously, and with their malice aforethought, and the malice aforethought of each

of them, did kill and murder the said William T. Box. The said M. F. Ball, J. C. Ball and R. E. Boutwell, and each of them being there, white men and not citizens of the Chickasaw Nation or of the Indian Territory, or any nation or tribe thereof, contrary to the form of the statutes of the United States of America in such cases made and provided, and againt the peace and dignity of the United States of America."

Certainly it will not be seriously contended that said indictment did not sufficientl charge the unlawful intent of plaintiffs in error to kill Box. To charge a wilful act is to charge an intentional act. To assalt and kill one with malice aforethought is an intentional killing. If so, then indictment No. 3 charged all that is necessary to constitute a statutory offense of an assault with intent to kill. If we are incorrect in this, then we say that every indictment for murder includes the offense of an assault with intent to kill, and a party charged with murder may be convicted of an assault with intent to kill. (Revised Statutes, Sec. 1035). It will readily appear to the judicial mind that if indictment No. 3 had charged the date and place William T. Box died, then the indictment would have been good for murder. Neither the date or the place he died was necessary to charge an assault with intent to kill. The place where the assault was committed is stated, and it would make no difference when or where he died. The offense of an assault with intent to kill was complete when the shooting and wounding was done, if he had

effect of the conviction of plaintiffs in error, J. C. Ball and R. E. Boutwell, of the offense charged in indictment No. 3. The assignment sufficiently presents the propositions we make.

We submit: 1st. That indictment No. 3 charged plaintiffs in error with an asault with intent to kill William T. Box. It may be claimed that as the indictment was not a good one for murder that therefore it was not good for an assault with the intent to kill. Such a position is not tenable. The indictment No. 3, after charging, "did unlawfully, fraudulently and feloniously, and with their malice aforethought, and with a certain deadly weapon, to-wit: a certain gun in the hands of the said M. F. Ball, J. C. Ball and R. E. Boutwell, then and there held, made an assault in and upon the body of one William T. Box, with said gun held as aforesaid, said gun being then and there loaded and charged with gunpowder and leaden balls, then and there held and used as aforesaid, the said M. F. Ball, J. C. Ball and R. E. Boutwell did shoot off and discharge the contents of said gun in and upon the body of the said William T. Box, inflicting thereon ten mortal wounds, of which mortal wounds the said William T. Box did languish and languishing did die." Said grand jury further charged: "And so the grand jurors upon their oaths aforesaid, do say that upon the day aforesaid, at the place aforesaid, with said deadly weapon aforesaid, in the manner aforesaid, and used as aforesaid, did unlawfully and feloniously, and with their malice aforethought, and the malice aforethought of each

of them, did kill and murder the said William T. Box. The said M. F. Ball, J. C. Ball and R. E. Boutwell, and each of them being there, white men and not citizens of the Chickasaw Nation or of the Indian Territory, or any nation or tribe thereof, contrary to the form of the statutes of the United States of America in such cases made and provided, and againt the peace and dignity of the United States of America."

Certainly it will not be seriously contended that said indictment did not sufficientl charge the unlawful intent of plaintiffs in error to kill Box. To charge a wilful act is to charge an intentional act. To assalt and kill one with malice aforethought is an intentional killing. If so, then indictment No. 3 charged all that is necessary to constitute a statutory offense of an assault with intent to kill. If we are incorrect in this, then we say that every indictment for murder includes the offense of an assault with intent to kill, and a party charged with murder may be convicted of an assault with intent to kill. (Revised Statutes, Sec. 1035). It will readily appear to the judicial mind that if indictment No. 3 had charged the date and place William T. Box died, then the indictment would have been good for murder. Neither the date or the place he died was necessary to charge an assault with intent to kill. The place where the assault was committed is stated, and it would make no difference when or where he died. The offense of an assault with intent to kill was complete when the shooting and wounding was done, if he had

never died. The fact that the indictment charges that they with their malice aforethought shot, wounded and killed Box, was a complete charge of an assault with intent to kill, but not good for murder, because it did not charge that Box died within a year and a day from the date he received the wounds, and did not name the place he died.

In the case of Ball vs. United States, 140 U. S. Report, page 136, the court says the "plaintiffs in error were well charged with an assault, but not with murder." If they were well charged with an assault, certainly the charging part of said indictment above quoted is sufficient to constitute said assault with intent to kill.

Authorities:

1st Bishop's Criminal Procedure, Sec. 521, 524 and 525.

Second Proposition:

Assuming that indictment No. 3 was a good indictment for an assault with intent to kill; what then was the effect of the judgment rendered by the circuit court on the 3d of Nov., 1889, adjudging J. C. Ball and R. E. Boutwell guilty as charged in said indictment? (See record, page 123). Was the judgment a valid judgment? We think so.

The indictment charged plaintiffs in error with shooting, wounding and killing William T. Box, with malice aforethought. The jury found them guilty as charged in the indictment. The finding related to that which was

well charged in the indictment. Hence the judgment is a valid judgment, from which no appeal has ever been taken by plaintiffs in error. This judgment was rendered Nov. 3d, 1889, and plaintiffs in error did not file petition for writ of error until after the 18th day of July, 1890, more than eight months after the rendition of said judgment. The Supreme Court did not reverse said judgment when they passed upon the case upon a writ of error. Said court reversed the orders fixing the penalty of death against plaintiffs in error. The court used the following language: "And returning jurisdiction, we hold that the orders of Nov. 15th, 1889, and July 18th, 1890, must be reversed for errors indicated. It may be that this leaves it open to us to remand the case with an order to the circuit court to proceed and give judgment on the verdict." Hence we see the judgment is yet a valid judgment, and the only judgment that could have been rendered upon order of the Supreme Court would have been fixing the penalty for the offense of which plaintiffs in error were found guilty. (See 140 U. S. Report, page 133). Plaintiffs in error were held as prisoners by virtue of said judgment from the 3d day of Nov., 1889, until the presentation of indictment No. 230, on the 7th day of May, 1891, more than 18 months. Said judgment is yet a valid judgment, unless vacated by a dismssal of case No. 3.

Third Proposition:

Plaintiffs in error, J. C. Ball and R. E. Boutwell,

were legally tried and convicted for the offense of assaulting, shooting and wounding William T. Box, said assault and wounding being acts and an offense and a necessary ingredient of the offense of murdering Box. Said conviction is a bar to further prosecution for any act of assaulting, shooting and wounding Box at the time and place laid in indictment No. 3, admitted to be the same transaction. (See record, 126).

Fourth Proposition:

The indictments having charged one and the same acts and transaction, and the government having selected and convicted plaintiffs in error for the offense of assaulting, shooting and wounding Box, there can be no further prosecution on the murder.

Authorities:

1st Wharton's Criminal Law, Sec. 565, and authorities before cited.

VI.

The court erred in overruling the written motion of the defendants J. C. Ball and R. E. Boutwell, filed herein before this case was called for trial, asking that they be awarded a separate trial from their co-defendant M. F. Ball, and in forcing them to be tried jointly with their said co-defendant M. F. Ball, because said motion which is made a part of the record in this cause and here referred to, stated facts sufficient to entitle them to a separate trial in this cause.

The court ought to have granted the motion for a severance made by plaintiffs in error, J. C. Ball and R. E.

Boutwell, because of reasons stated in said motion, as follows:

In the Circuit Court of the United States, Eastern District of Texas.

THE UNITED STATES
vs.
M. F. BALL ET AL.

27 Now come the defendants J. C. Ball and R. E. Boutwell, and pray the court to grant them a severance in this case that they may have a separate trial from their co-defendant M. F. Ball, for the following reasons, viz:

1st. Because their said co-defendant has once been tried and acquitted of the identical offense with which he is now charged.

2d. Because the government relies on acts and declarations of M. F. Ball as evidence upon which a conviction will be asked, which acts and declarations were made after the death of William Box, the party alleged to have been murdered, which acts and declarations were not made to the knowledge of or in the presence or hearing of either of these defendants.

3d. Because the proof that will be offered by the prosecution will show that M. F. Ball was not present at the time Box was killed, and was doing no act that would constitute him a principal in the alleged murder of William Box.

4th. Because this court has no jurisdiction to try M. F. Ball, as fully appears from his plea herein.

5th. Because M. F. Ball is a material witness for these defendants, and they have a right to his testimony free from the embarrasments of a defendant on trial.

Wherefore they pray that a severance be granted and that M. F. Ball be first tried.

We believe the evidence shows M. F. Ball to be an accessary before the fact and not a principal; hence J. C. Ball and R. E. Boutwell should have had a separate trial. If M. F. Ball was an accessory, then he should have been indicted as such, and to indict and try him jointly with J.

C. Ball and R. E. Boutwell, admitted his declarations, which was well calculated to prejudice the jury against plaintiffs in error, J. C. Ball and R. E. Boutwell, the court abused its discretion in not granting the severance as prayed for. If M. F. Ball was an accessory he could not legally be tried and convicted until after the conviction of his principals.

Authorities:

1st Bishop's Criminal Law, Secs. 668, 689, 803.

II.

The court erred in refusing to first try the special plea of the defendant M. F. Ball to the jurisdiction of the court, before these defendants were required to announce ready upon the merits of the case (which said special plea is made a part of the record herein, here referred to, and made a part hereof), because by submitting said special plea to the jury, together with the other issues in the case, there was created before said jury a multiplicity of issues, was liable to mislead and confuse them, and, by hearing all of the facts, prejudice them against the said M. F. Ball, and thereby influence said jury in finding against his said special plea.

Said plea is in words and figures as follows:

And now comes M. F. Ball, one of the defendants in the above entitled and numbered cause, and says that the government ought not further prosecute this cause against this defendant, because he says that the crime charged against this defendant is not an offense against the laws of the United States, and that this court has no jurisdiction to try him for the said alleged offense, for the reason that the deceased, William T. Box, and this defendant were

each citizens of the Chickasaw Nation and members of the tribe of Chickasaw Indians at the time this offense is alleged to have been committed, and the crime alleged in the indictment was committed, if at all, in the Chickasaw Nation, Indian Territory; wherefore this defendant says that this court has no jurisdiction to try this defendant for the crime charged against him herein, and he prays that he be discharged and go hence without day.

HODGES & NICHOLS and
J. M. LONG,
Attys. for Deft.

STATE OF TEXAS, }
County of Lamar. }

Before me, the undersigned authority, on this day personally appeared M. F. Ball, who being by me duly sworn, on his oath says that the facts set forth in the foregoing plea are true.

M. F. BALL.

Sworn to and subscribed before me, this 30th day of April, A. D. 1894.

H. H. KIRKPATRICK.
U. S. Commissioner.

The plea to the jurisdiction was not excepted to; it was sufficient upon its face to raise the question of jurisdiction of the court to try plaintiff in error for the offense charged, and we contend that plaintiff in error had the legal right to have the plea to the jurisdiction tried before he could be forced to plead to the charge in the indictment.

Authorities:

American Criminal Law, Wharton, 4th Ed., Sec. 534.

2 Hale, 286.

VII.

The court erred in sustaining the objection of the district attorney and in preventing the defendants from proving by the government witness Joe Cross how much he and Ed. Burney, both of whom were material witnesses for the government in this case, had paid or promised to pay Mr. Ownby for his services in assisting the district attorney in his prosecution of this case, because the same was a legitimate inquiry upon the trial of this cause, in that it tended to show the interest and feeling of said witnesses against these defendants.

VIII.

The court erred in permitting the government upon the trial of this cause to prove, over the objection of these defendants, by the government witness Ed. Burney, that he, the said Ed. Burney, and Joe Cross had not employed private counsel to assist in the prosecution of this case on account of any ill feeling towards either of these defendants, but they had employed such counsel because Wm. T. Box, the deceased, was a warm personal friend of theirs, a next door neighbor, and because they had known him for 20 or 25 years, because the same was an attempt upon the part of the government and tended to prove that the deceased was a revered and honored citizen, when neither of the defendants had put his character in issue, and was therefore calculated to prejudice the jury against these defendants charged with his murder.

We will consider VII. and VIII. assignments together.

Plaintiffs in error should have been permitted to prove what amount the witnesses were paying the private

prosecutor, to show interest and feeling in the case. This being denied plaintiffs in error, the witness Ed. Burney ought not to have been allowed to explain why he and Cross had employed counsel to prosecute plaintiffs in error.

IX.

The court erred in permitting the government to prove by its witness Maggie Freeman, over the objection of these defendants, that she heard the defendant J. C. Ball's son say, while all of these defendants were under arrest, "that if it had not been for those old boots they never would have suspected them of killing deceased," because the proper predicate had not been laid authorizing the admission of said testimony.

Where a prisoner is under arrest for crime, before any statement made by him can be offered in evidence against him, a predicate must be laid. No sufficient predicate having been laid, the testimony of Maggie Freeman was improperly admitted over the objections of plaintiffs in error. The evidence was damaging to plaintiffs in error.

Authorities:

U. S. Revised Statutes, Sec. 858.

Texas Statutes as follows: 2464.—Art. 750. When confession shall not be used.—The confession shall not be used if at the time it was made the defendant was in jail, or other place of confinement, nor while he is in custody of an officer, unless such confession be made in the voluntary statement of the accused, taken before an examining

court in accordance with law, or be made voluntarily after having been first cautioned that it may be used against him, or unless in connection with such confession he make statement of facts or of circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property, or instrument with which he states the offense was committed. (O. C. 662).

Ake vs. State, 30 Texas Report, 466.

Barnes vs. State, 36 Tex. Report, 356.

Adams vs. State, 34 Tex. Report, 526.

Our contention is that where there is no role laid down by the United States Statute, then the laws of the state in which the court is setting will govern as to the competency of the witness and the admisability of evidence.

X.

The court erred in admitting in evidence, over the objection of these defendants, a certified copy of a marriage license under the hand and seal of the clerk of Cooke county, Texas, showing that S. C. Mayfield married Lucy O. Box prior to the time she married the defendant herein M. F. Ball (which certified copy was made a part of the record herein and here referred to), because the government thereby proved the contents of a written instrument by substitutionary evidence without showing the loss or destruction of the original, and because said marriage license, or a certified copy thereof, was not endorsed upon the back of the indictment against these defendants, and because they had no notice whatever that the government would offer said marriage license or a certified copy thereof in evidence against them, and because said marriage license raised an issue in this case, to-wit: the validity of the marriage of M. F. Ball with Lucy O. Box, alias Lucy

O. Mayfield, which these defendants, and especially the said M. F. Ball, was not prepared to meet, and did not know would be raised upon the trial of this cause.

This assignment presents the question as to the right of the prosecution to use evidence upon the trial of a capital case without first giving notice to the defendant.

Our contention is that the law requires the names of all witnesses placed on the indictment and the defendant served with a copy of the names of witnesses. (Sec. 1033 Revised Statutes of the United States). The Statutes are silent as to documentory evidence. We think defendants should have had notice that the government would offer the certified copy of license in evidence. The Statutes of Texas are as follows:

Art. 2257, Revised Statutes of Texas.—"Every instrument of writing which is permitted or required by law to be recorded in the office of the clerk of the county court and which has been or may be so recorded after being proven or acknowledged in the manner provided by the laws in force at the time of its registration shall be admitted as evidence without the necessity of proving its execution; provided, that the party who wishes to give it in evidence shall file the same among the papers of the suit in which he proposes to use it, at least three days before the commencement of the trial of such suit, and give notice of such filing to the opposite party or his attorney of record, and unless such opposite party or some other person for him shall, within three days before the trial of the cause, file an affidavit stating that he believes such in-

strument of writing to be forged, and whenever any party to a suit shall file among the papers of the cause an affidavit stating that any instrument of writing recorded as aforesaid has been lost, or that he cannot procure the original, a certified copy of the record of any such instrument shall be admitted, in like manner aa the original could be."

Marriage license are required to be recorded. Art. 2842, Texas Statutes, provides:

"The said clerk shall record all licenses so issued by him in a well-bound book kept for that purpose, and it shall also be the duty of the persons solemnizing the rites of matrimony to endorse the same on the license and make return of the same to the office of the clerk of the county court within sixty days after the celebration as aforesaid, which return shall be recorded as aforesaid."

Sec. 906, U. S. Statutes, gives to records such faith and credit as is given them in the courts of the state or territory from which they are taken.

Our contention is the marriage license being required to be recorded that could only be admitted under the laws of Texas above quoted.

XI.

The court erred in admitting Mrs. L. O. Angling to testify, over the objections of these defendants, that "she thought she was legally married to one of these defendants, to-wit: M. F. Ball, but had learned since that she was not legally married to him, and that at the time she married the defendant M. F. Ball, her former husband, S. C. Mayfield, was living; that she had never been divorced

from him, and that the defendant M. F. Ball knew that said Mayfield was living at the time she so married the said M. F. Ball," because the said defendant M. F. Ball, prior to the time said witness so testified, introduced in evidence in this case a marriage license, issued by the legal authorities of the Chickasaw Nation, Indian Territory, showing that he, the said M. F. Ball, had, prior to the time Wm. T. Box was killed, married the said witness, and said witness testified that she lived with said M. F. Ball from the time she so married him up to the time her father, Wm. T. Box, was killed, and that she never had been divorced from him.

Mrs. Angling was not a competent witness against M. F. Ball, because she was, at the time she was offered, the wife of M. F. Ball, as fully appeared by the marriage license that had been offered in evidence. Mrs. Angling was not a competent witness to prove that she could not legally contract marriage at the time she married M. F. Ball. (1st Greenleaf on Evidence, Sec. 334).

XIII.

The court erred in refusing to require the government's officials to deliver the gun introduced in evidence to these defendants, or some other competent person, for the purpose of testing said gun as to the manner in which it shot "low-mould" buckshot, because said gun was the property of J. C. Ball, one of the defendants herein, but had been in the exclusive possession of the government's officials shortly after the killing of Wm T. Box, in 1889. Defendants made said request before they closed their case. It was an admitted fact that deceased, Wm. T. Box, was killed with a shotgun loaded with low-mould buckshot, held by some one at a distance of 8 or 10 feet away; that the shot penetrated his body from his shoulders to his hip; the government witness Blunt testified that the gun in court and the property of the defendant J. C. Ball would "scatter" "low-mould" buckshot badly; defendant J. C. Ball testified that he never shot "low-mould" buckshot from the gun. The fact as to how said gun

to mislead the jury and prejudice them against said J. C. Ball and R. E. Boutwell.

This assignment will be discussed under assignment No. XVIII., record page 149.

XV.

Because the court erred in failing and refusing to give to the jury the special charges, Nos. 1 and 2, asked by the defendant M. F. Ball, and which said special charges are as follows:

"1st. If you believe from the evidence in this case that the defendant M. F. Ball is the same M. F. Ball named in indictment No. 3, introduced in evidence herein, and that a jury duly selected, empaneled, and
683 sworn to try him upon said indictment returned a verdict of not guilty against said M. F. Ball, and if you further believe from the testimony in this case that the said M. F. Ball was charged in said indictment No. 3 with the same transaction and offense as charged in the indictment in this case, i. e., if you believe that he, the said M. F. Ball, was charged in said indictment No. 3 with the shooting, wounding, killing, and murdering of Wm. T. Box, in Pickens county, Chickasaw Nation, Indian Territory, and if you further believe that Wm. T. Box was dead at the time said indictment No. 3 was returned against said M. F. Ball, and that that fact was known to the government's prosecuting officer who drew said bill of indictment No. 3, at the time he so drew the same, then you are charged that the said M. F. Ball has been once placed in jeopardy for the shooting, wounding, assaulting, killing and murdering of Wm. T. Box, and you will find the defendant's M. F. Ball's plea of former acquittal to be true and find him not guilty upon the indictment herein.

"2d. You are instructed that under the evidence and admissions in this case, the defendant M. F. Ball has been heretofore tried and acquitted of the killing and murdering of Wm. T. Box and by a valid judgment of this court discharged of said offense, which said judgment has been in no way set aside, annulled, or otherwise vacated or appealed from; you will therefore find the said M. F. Ball's plea of former acquittal and former jeopardy to be

true and acquit him herein."

684 And the court erred in his general charge, wherein he charged the jury in this case as follows, to-wit:

"The defendant Filmore Ball has further pleaded that he has been tried heretofore in this court on an indictment charging him with the murder of Box, and was acquitted. The facts are admitted that he was so tried, and he pleads former acquittal in bar of this prosecution. Upon that plea you are instructed that the Supreme Court of the United States has decided that the indictment was defective in so far as it attempted to charge the offense of murder, and the defendant's plea of former acquittal would not be good, and you would find against him. In other words, parties indicted upon a defective indictment could not plead a former conviction or acquittal; and you are instructed to find against that plea."

Because it was admitted upon the trial of this cause that the offense charged in indictment No. 3, returned into the Circuit Court of the United States in and for the Eastern District of Texas, at Paris, Texas, on the 17th day of October, A. D. 1889, by a grand jury duly empaneled in said court, which said indictment is made a part of the record in this cause and here referred to, and indictment No. 230, returned into said court on the 7th day of May, A. D. 1891, and upon which these defendants have been tried and convicted in this case, is for one and the same transaction and offense—that is to say,

685 for the killing and murdering of Wm. T. Box by the defendants herein, M. F. Ball, J. C. Ball and R. E. Boutwell, and that the said M. F. Ball, J. C. Ball and R. E. Boutwell named in said indictment No. 3 are the same M. F. Ball, J. C. Ball and R. E. Boutwell named in indictment herein, No. 230, and not other and different parties; and the uncontroverted evidence in the case, which was admitted without objection from the government, showed conclusively that the defendant M. F. Ball was tried in this court upon said indictment No. 3, and acquitted of said offense prior to the time indictment No. 230 herein was returned against him, and he, said M. F. Ball, placed once in jeopardy of life and liberty, and acquitted of said offense in a court of competent jurisdiction and by a judgment of said court, made and entered, discharged. The facts demanded this charge.

same identical J. C. Ball and R. E. Boutwell charged in indictment No. 3, introduced in evidence herein, and if you further believe that the said indictment No. 3 charged the said J. C. Ball and R. E. Boutwell with the same transaction and offense as the indictment herein charges them, i. e., the shooting, wounding, assaulting, killing and murdering of Wm. T. Box in the Chickasaw Nation, Indian Territory, and if you further believe from the testimony that at the time said indictment No. 3 was returned against said defendants, that the grand jury had returned the same and the government's officer who drew said
689 indictment No. 3 knew that Wm. T. Box was dead at the time they so drew said indictment, and that he died from the infliction of the gunshot wound charged to have been inflicted by these defendants, and if you further believe that the said defendants were arraigned, tried and convicted upon said indictment No. 3, by a jury duly selected, empaneled and sworn, then I charge you that the defendants J. C. Ball and R. E. Boutwell were each charged in said indictment No. 3 with an assault to kill and murder the said Wm. T. Box, and that the government of the United States, through its officers aforesaid, by presenting in this court said indictment No. 3, carved out of the shooting and wounding, killing and murdering of Wm. T. Box a lesser offense than murder, to-wit: assault to commit murder, and by the empaneling and swearing the jury to try said defendants upon said indictment and in requiring said defendants to plead thereto, the government has waived its rights to prosecute said defendants for the crime of murder and is now estopped from claiming a conviction in this case for any offense higher than assault to murder, and you will therefore find the special plea of said defendants, pleading former jeopardy and former conviction, to be true."

And the court erred in his general charge to the jury, wherein he charged them as follows: "The defendants J. C. Ball and R. E. Boutwell have filed a plea that they were tried in this court under an indictment that
690 was good for an assault with intent to kill and were found guilty of this offense, consequently the court no longer has jurisdiction to try them for murder, because they say they have been convicted of a lower degree, and therefore cannot be again convicted for murder. You will find against that plea, for the reason the Supreme Court held the indictment bad for murder and do not say

that it charged an assault to murder, and you are instructed to find against that plea."

Because it was admitted upon the trial of this cause that the offense charged in indictment No. 3 returned into the Circuit Court of the United States in and for the Eastern District of Texas, on the 17th day of October, A. D. 1889, by a grand jury duly empaneled in said court, which said indictment is made a part of the record in this cause, and here referred to and made a part hereof, and indictment No. 230, returned into said court on the 7th day of May, A. D. 1891, and upon which these defendants have been tried and convicted in this case, is for one and the same transaction and offense, that is to say, for the killing and murdering of Wm. T. Box by the defendants herein; that the said M. F. Ball, J. C. Ball and R. E. Boutwell named in the indictment No. 3 are the same M. F. Ball, J. C. Ball, and R. E. Boutwell named in the indictment herein, No. 230, and are not other and different persons, and the uncontroverted evidence in this case,
691 which was admitted without any objection being made thereto, shows that the defendants J. C. Ball and R. E Boutwell were tried upon said indictment No. 3 in the Circuit Court of the United States in and for the Eastern District of Texas, at Paris, Texas, and convicted of the offense therein charged, prior to the time indictment No. 230 herein was returned into said court; that the government's officer who drew said indictment No. 3 knew at the time he drew the same, and the grand jury was aware at the time they returned the same into this court, that the said Wm. T. Box was dead at the time, and that he died from the infliction of gunshot wounds, charged to have been inflicted upon him by these defendants; that said indictment No. 3 charged these defendants with an assault to kill the said Wm. T. Box, and the government, by the presenting of said indictment No. 3, carved out of the offense of shooting, wounding, assaulting, killing and murdering of said Box, the lesser offense of assault to kill and murder, and was thereby estopped from presenting against these defendants indictment No. 230 herein, charging them with the higher crime, to-wit: murder.

After the court admitted evidence as to the truth of the pleas filed this instruction ought to have been given.

XVIII.

The court in his charge to the jury committed a fundamental error as to the defendants J. C. Ball and R. E. Boutwell, in failing to charge the jury that the declarations of the defendant M. F. Ball as testified to by the government witnesses, J. T. Hoover and Mrs. Rider, admitted over the objections of these defendants,
692 could only be considered by them in passing upon the guilt or innocence of the defendant M. F. Ball, and should not be considered by them in passing upon the guilt or innocence of the defendants J. C. Ball and R. E. Boutwell, because said declarations of said M. F. Ball to said Hoover and Mrs. Rider were objected to by defendants at the time the same was offered in evidence, and the testimony shows that said declarations were made by said M. F. Ball after the killing of Wm. T. Box, and that they were made by him, the said M. F. Ball, in the absence of the defendants J. C. Ball and R. E. Boutwell.

First Proposition under XVIII Assignment:

Declarations of one person charged with crime are never admissible against another, if made in the absence of the other after the commission of an alleged crime.

Authorities:

1 Greenleaf, paragraph 111.

3 Greenleaf, paragraph 94.

Second Proposition:

Where two or more parties are upon trial and proof of declarations of one are admitted, over the objection of others jointly indicted and upon trial, it is the duty of the court to limit said testimony in its charge.

Authorities:

Jones Case, 31st Gratt., (Va.) 836.

2 Bishop's Crim. Pro., Sec. 230.

3 Greenleaf, Sec. 33 and 94.

Com. vs. Ratcliff, 130 Mass., Rep., p. 36.

Miller vs. Com., 78 Ky. Rep., 15.

Heine vs. Com., 91 Pa. St., 145.

Wilson vs. The People, 94 Ill., 299.

ARGUMENT.

The testimony of Hoover and Mrs. Rider was self-served and proved nothing against M. F. Ball that tended to make him a principal. But his declarations were very damaging to J. C. Ball and R. E. Boutwell. She testified as follows:

Q. Say anything after the killing?

342 A. Only what he told me on the morning of the 27th; he told me that they was going to arrest him; that he did not care; that he could prove out of it.

Q. What was that he said?

A. He said on the morning of the 27th that they was going to arrest him that morning; that he did not care if they did, he could prove out of it; that there was two men that staid all night with him that could prove where he was; that they could not prove anything against him, and that they never would dream of John Ball and Bob Boutwell doing such a thing; that they would take him and try him and could not prove anything against him, and they would turn him loose.

Q. Go ahead.

A. He said he did not see what they were tracking around for; that they could not make nothing out of tracks; that he was perfectly satisfied that the tracks would just exactly fit John and Bob, but so far as his tracks were concerned he was not at all afraid of it; he said that he did not see why Joe Cross and Ed. Berney

was dishing in so deep for; that it was none of their business; that if it had not been for Joe Cross and Ed. Berney they would not have said anything about it, and they would not have been bothered. Then he asked me about how many shots they got out of the old man; I told him; he said he shot the other load at some chickens and loaded the gun with fresh shot, and he wanted to know if
343 I thought they would still think John's gun killed the old man; he said they was going to lay it off on an old lady there.

Q. What did he say about the other track?

A. He said that there was more than one foot that made a big track; that Huse Graves' track would just fit the big track. Then he told me if he could he would call the old man back this morning as quick as he ever did anything in his life. I told him it was too late. Then he asked me if I noticed everybody down there eyeing him and watching him.

A. I told him I did not; but I did see them. He asked me if I thought he looked bad. I told him that I did not. Then he said he saw everybody there eyeing him all the time.

Plaintiffs in error J. C. Ball and R. E. Boutwell objected to the introduction of the above evidence as against J. C. Ball and R. E. Boutwell. The court admitted the evidence over the objection, saying at the time to plaintiffs' counsel: "Of course it will only be evidence against Filmore if he said anything." (See record, page 96). This evidence was very strong against plaintiffs J. C. Ball and R. E. Boutwell, and left to the jury to consider it as it was without any qualification, must have injured the substantial rights of plaintiffs in error J. C. Ball and R. E. Boutwell.

The court's remarks above quoted as addressed to counsel could not be regarded as a qualification of said evidence. It placed no limit on it so far as the jury was concerned and it now fully appears that the jury considered

said evidence just as they did the other evidence, at least nothing to the contrary appears in the record.

The court having admitted the evidence as against M. F. Ball, it was its imperative duty to qualify the same by its general charge and a failure to do so was fundamental error for which this cause ought to be reversed, as to J. C. Ball and R. E. Boutwell. Jones Case 31 Gratt. (Va.) 836, states the correct doctrine; the court said in that case: "But on a joint trial of two for conspiracy, declarations of one, made after the design was completed and abandoned, are admissible, because they tend to connect him with the conspiracy; but the judge should instruct the jury that these declarations have no weight to prove the other guilty of conspiracy." The court failed to instruct in keeping with the principle here announced; hence error.

XIX.

The court erred in permitting the jury, after this case had been submitted to them, to come into court during the absence of all of these defendants and demand from the court the reproduction of the testimony of H. H. Kirkpatrick and Tony Hertz from the notes of the stenographer, and in telling the jury, in the absence of these eefendants, "I will have the stenographer to extend the testimony from her notes and will let you know when I get it ready." And the court erred in having said testimony so extended to the jury after this case had been submitted to them, without the knowledge or consent of either of these defendants or their attorneys, be
603 cause said typewritten copy of the testimony of said witnesses, so delivered to the jury by the court, was not verified by the oath of said stenographer, and the court, by delivering said typewritten testimony to the jury, presented to said jury other and further testimony for

their consideration after the case had been submitted to them, and he thereby presented to said jury said testimony in the absence of the these defendants, thereby denying them the right of cross-examining said witnesses, and the court thereby presented to said jury other and further testimony in a manner and from a source not authorized by law and in violation of the Constitution of the United States, guaranteeing that in criminal prosecutions the accused shall be confronted with the witnesses against him.

Proposition.

No evidence could be delivered to the jury in the absence of plaintiffs in error before or after the jury retired to consider of the verdict.

Authorities:

Loan Co. vs. Mix, 51 N. Y. 558.

Burn vs. Croul, 10 Johnson, 238.

2 Thompson on Trials, Sec. 2555.

The consent or even request of counsel to deliver evidence to the jury could not effect the rights of plaintiffs in error.

XX.

These defendants have not been convicted by due process of the law of the land in this: The jury that returned the verdict of guilty against the defendants in this case was not placed in charge of a duly sworn bailiff of this court after they were empaneled and charged with this case until they returned a verdict of guilty against these defendants, but, upon the contrary, said jury was in the exclusive control of Drumgoole Williams from the time they were empaneled until they returned their said verdict,
693 without any oath whatever being administered to him, the said Drumgoole Williams, as such special bailiff, all of which will be made apparent by an inspection of the record in this cause, here referred to and made a part hereof.

The record shows that Drumgoole Williams who had the jury in charge was not a sworn bailiff as required by law. See record page.

Authorities:

1st Bishop's Crim. Pro. 991 and 992.

XXIII.

The court erred in not granting the defendant M. F. Ball a new trial on account of the newly discovered evidence of J. L. Keeler, the marriage license of C. S. Mayfield to Louisa Rodgers, and a certified copy of the record of the divorce proceedings of Louisa Mayfield vs. C. S. Mayfield, had in the district court of Cooke county, Texas, all of which fully appears in the record in this case, here referred to and made a part hereof; because said defendant M. F. Ball had no notice prior to the trial of this cause that the Government would introduce in evidence the marriage license of C. S. Mayfield and Lucy O. Box, the wife of said defendant, and in that way attempt to show that said defendant M. F. Ball was not legally married to Lucy O. Box, alias Mayfield, a Chickasaw Indian woman, and thereby establish the fact that this court had jurisdiction to try said M. F. Ball, and because said newly discovered evidence showed conclusively that said M. F. Ball was lawfully married to said Lucy O. Box, alias Mayfield, and the deceased being a member of the Chickasaw
696 tribe of Indians, this court did not have jurisdiction to try the said M. F. Ball for murdering said deceased.

Proposition.

After conviction if it is made to appear to the court trying a criminal case that the court had no jurisdiction, a new trial should be granted, and the prisoner discharged.

Authorities:

Ex-parte Lange, 18 Wall. 163.

" Weiginid, 100 U. S., 339.

" Mills, 135 U. S., 107.

The evidence offered by the government upon the trial showed positively that the deceased Box was an Indian citizen by adoption.

He having married an Indian woman and lived in the Territory for many years with her as his wife. Plaintiff in error M. F. Ball proved on the trial that he married a daughter of deceased Box. The government, without any notice to M. F. Ball, proved by certified copy of marriage license that Miss Lucy Box, now M. F. Ball's wife, was married to one Mayfield before she married Ball and that she had not been divorced at the time she married M. F. Ball, this proof under the charge of the court forced the jury to find against M. F. Ball's plea to the jurisdiction. See charge of the court, Record page 129. After the conviction, plaintiff in error M. F. Ball discovered the real fact to be at the time Mayfield married Miss Lucy Box, he, Mayfield, had a living wife and a divorce suit then pending in Cooke county, Texas. This undisputed proof showed the marriage between Mayfield and Miss Box to be invalid; hence she could marry M. F. Ball at the time see did and the marriage was valid and constituted Ball a citizen of the Chickasaw Nation, therefore the court had no jurisdiction to try M. F. Ball for the murder of Box.

XXV

The court erred in overruling the seventeenth (17) ground in the motion for a new trial made by the defendant M. F. Ball, which is as follows, to-wit: "Because the verdict of the jury finding this defendant guilty of the murder of Wm. T. Box is contrary to the law as given in charge by the court, is contrary to the evidence

adduced, and is without evidence to support it in this: the testimony conclusively shows that if this defendant is guilty of any offense he is guilty as an accessory and not as a principal offender in the killing of Wm. T. Box."

XXVI.

698 The defendant M. F. Ball has not been tried by due process of the law of the land in this: He was indicted, tried, convicted and sentenced to death upon an indictment charging him, the said M. F. Ball, with being a principal offender in the killing and murdering of Wm. T. Box, when all of the evidence, which is made a part of the record in this case, here referred to and made a part hereof, shows conclusively that *that* the said M. F. Ball was not present when the said Box was killed; that he, the said M. F. Ball, was doing no act at the time said Box was killed in furtheranceo f a common design of these defendants or any one else to kill deceased; but the testimony shows conclusively that the said M. F. Ball, at the very time the shot was fired that killed deceased, was at a house a half mile away playing a fiddle for parties at a dance; and said testimony shows that the said defendant M. F. Ball was not a principal offender in the killing of said Box, but if guilty of any offense he was guilty as an accessory to said killing.

Assignments 25 and 26 will be considered together. The proposition is fully stated in the assignments.

If the evidence offered on the trial and now contained in the record shows plaintiff in error M. F. Ball to be an accessory, then the present conviction cannot stand. Because said indictment upon which the conviction was had charges M. F. Ball as a principal.

Authorities:

1st Bishop's Criminal Law, Secs. 653, 663.

Hughes vs. State, 12 Ala., p. 458.

Hately vs. State, 15 Ga., p. 345.

ARGUMENT.

It was the intention of the solicitor general and counsel for plaintiffs in error to have incorporated in the record all the evidence that tended to show M. F. Ball's connection with the murder before, at the time and after it was committed. Proceeding upon the theory that all the evidence connecting plaintiff in error M. F. Ball with the murder of deceased, Box, is contained in the record before the court, we insist that the same is insufficient to sustain the conviction of M. F. Ball as a principal, but that the same shows M. F. Ball to be an accessory.

We will not now undertake to analize the evidence further than to show that the undisputed evidence shows that M. F. Ball was not present at the time of the killing of Box, but was at R. E. Boutwell's house. (See evidence of Bud Ashly, record page 59): "M. F. Ball was in the house playing the fiddle."

N. B.—The house was about one thousand yards from where Box was killed. (See testimony of Joe Cross, record page 35). The testimony of Miss Nannie Blount, record pages 90, 91 and 92, shows positively that at the time she heard the report of a gun that must have been the gun that killed Box, plaintiff in error M. F. Ball was playing the fiddle for the set she was dancing at the time the gun fired.

It will be contended by the prosecution that the proof shows that M. F. Ball was doing acts just about the time the shooting took place to prevent the crowd at the dance

from dispersing. Grant that he was; will this fact sustain the present judgment finding him guilty as a principal? We think not. Mr. Bishop, and other authorities of high repute, declare the test to be: "If the will of such other individual contributed to the act, the test to determine whether the law deems him a principal rather than an accessory is whether he was so near or otherwise so situated as to make his personal help, if required to any degree, available." Certainly it cannot be said that the proof upon which plaintiff in error M. F. Ball was convicted shows that he was so near the killing of Box, or was so situated as to give any personal help or aid to those engaged in the act of murdering Box. The evidence is undisputed that M. F. Ball was not present at the killing of deceased Box. The situation of plaintiff in error at the very moment of the killing is shown, which make it absolutely impossible for him to have rendered any personal help or aid to those engaged in killing Box. We therefore conclude that whatever connection M. F. Ball may have had with the murder of Box, or complicity in or conspiracy to murder Box. The proof wholly fails to show that M. F. Ball is guilty as a principal, and the present conviction cannot stand without doing violence to the substantial legal right of plaintiff in error M. F. Ball. This case ought therefore to be reversed on the above assignment.

Plaintiffs in error filed motion in arrest of Judgment as follows:

THE UNITED STATES
vs.
M. F. BALL ET AL. } No. 230.

Now comes the defendants, M. F. Ball, J. C. Ball and R. E. Boutwell, and leave of the court first had and obtained, file their amended motion in arrest of judgment in lieu of their motion filed herein on the 17th day of May, A. D. 1894, and each move the court to arrest the judgment heretofore entered against them, adjudging them guilty of murder, because the indictment in this
35 case upon which these defendants were tried and convicted is insufficient in law and fatally defective in the following particulars, viz:

I.

Said indictment fails to allege that Wm. T. Box died of the mortal wounds inflicted by these defendants in and upon his body.

II.

Said indictment fails to give a discription of the mortal wounds inflicted in and upon the body of Wm. T. Box by these defendants, and fails to allege upon what portion of his body said mortal wound was inflicted.

III.

Said indictment fails to allege that the offense with which these defendants stand charged was committed at a place within the sole and exclusive jurisdiction of this court.

IV.

Because there is no allegation in the indictment showing that this court has jurisdiction to try these defendants for the offense alleged, in that it does not aver that the deceased, Wm. T. Box, and each of these defendants were not members of any tribe of Indians in the Indian Territory by marriage or adoption.

V.

Because there is no allegation in the indictment that Wm. T. Box died withing the jurisdiction of the
36 Eastern District of Texas.

Wherefore these defendants pray that the judgment heretofore entered against them be arrested, set aside, and held for naught, and that the indictment herein be quashed.

HODGES & NICHOLS and
J. M. LONG,
Attorneys for Defendants, M. F. Ball,
J. C. Ball and R. E. Boutwell.

Plaintiffs in error, in their first assignment of error, say the court erred in overruling this motion in arrest of judgment. The motion as above copied, presents the sufficiency of the indictment without copying the assignment of error here.

For convenience, we here copy charging part of indictment from record, page 1 and 2:

"On their oath in said court present: That one M. F. Ball and one J. C. Ball and one R. E. Boutwell, late of Chickasaw Nation, Pickens county, Indian Territory, in the district and circuit aforesaid, on the twenty-sixth day of June, in the year of our Lord eighteen hundred and eighty-nine, in Pickens county, in the Chickasaw Nation, in the Indian Territory, the same being annexed to and constituting a part of the said fifth circuit, and an-
4 nexed to and constituting a part of the Eastern District of Texas, for judicial purposes, and being within the jurisdiction of this court, did unlawfully, fraudulently, and feloniously, and with their malice aforethought, and with the malice aforethought of each of them, and with a certain deadly weapon, to-wit: a certain gun by the said M. F. Ball, J. C. Ball and R. E. Boutwell, then and there held, make an assault in and upon the body of one William T. Box, with said gun held as aforesaid, said gun being then and there loaded and charged with gunpowder and leaden balls, then and there held and used as aforesaid, the said M. F. Ball, J. C. Ball and R. E. Bout-

well did then and there shoot off and discharge the contents of said gun at, in, and upon the body of said William T. Box, inflicting thereon a mortal wound, of which mortal wound the said William T. Box did languish, and languishing did then and there instantly die, and did then and there die within a year and a day after the infliction of the said mortal wound as aforesaid.

And the said grand jurors aforesaid, upon their oaths aforesaid, do say that upon the day aforesaid, at the place aforesaid, with said deadly weapon aforesaid, in the manner aforesaid, and used as aforesaid, the said M. F. Ball, J. C. Ball and R. E. Boutwell, did unlawfully, feloniously, and with their malice aforethought, kill and murder the said William T. Box; the said M. F. Ball, J. C. Ball and R. E. Boutwell, and each of them being then and there white persons, and not Indians nor citizens of the Indian Territory, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America."

Is this indictment such an indictment as would sustain a conviction and judgment at common law for the offense of murder? If so, the motion in arrest was properly overruled. But if the indictment is not such an indictment as is necessary to sustain a conviction and judgment for murder at common law, then this court ought to reverse this case and order the prosecution dismissed.

We now undertake to show the court that the indictment upon which plaintiffs in error were convicted is not good.

Proposition.

Every ingredient of which an offense is composed must be accurately and clearly charged. This is elementary.

1st. The indictment fails to allege the place of death. It is not charged to have taken place within the jurisdic-

tion of the court. This is an essential allegation. (See 1st Wharton's Crim. Law, 9th Ed., Sec. 538; Ball vs. U. S., 140, page 118). Place must be avered. The indictment at common law should also aver that the deceased died in the county in which the indictment is found. Where the stroke is at one time or place and the death at another, if the day be especially alleged it should be that on which the party died and not that on which he was stricken, for until he died it was no murder. (Wharton on Homicide, 2d Ed., Sec. 846).

The charge that "of which mortal wound the said William T. Box did langush, and languishing did then and there instantly die, and did then and there die within a year and a day after the infliction of the said mortal wound as aforesaid," is not sufficient. Said language does not charge that Box died in the Indian Territory and within the jurisdiction of the Federal Court, Eastern District of Texas.

The indictment does not charge that said Box did then and there languish, but it charges: "Said William T. Box did languish, and languishing did then and there instantly die." This language does not allege where Box languished, but it imports that he lived after the mortal wound was inflicted, and after languishing did then and there instantly die, i. e. at the place where he languished. The language used by the pleader, "did languish and languishing did then and there instantly die," clearly imports some lapse of time after the reception of the mortal wound before death occurred. The words "then and there" em-

ployed in the sentence and used after the words "did languish," and refer to the time of the languishing and not to the time of the infliction of the mortal wound. It would be impossible for a wounded man to languish and instantly die at the same time, because to languish means to live. Mr. Webster says to languish means "to become languid or weak, to sink away, to lose strength or animation, to be or become dull, weak or spiritless; to pine; to be or grow heavy." How long Box lived after receiving the mortal wound is not stated, other than that he died within a year and a day after receiving the wound. If the pleader intended to charge that Box instantly died from the effects of the mortal wound, why charge that he died within a year and a day after receiving the mortal wound? The allegation "did then and there instantly die" would be within a year and a day if the words "languish and languishing" had not been used. But the plain import of the language, all taken together, is plain: 1st. Box was wounded on the 26th day of June, 1889, in Pickens county, Indian Territory. 2d. Box languished and after languishing some time, he then and there, i. e. where he languished, did instantly die, and the time of death was on some date not named, but within less than a year and a day after the wound was inflicted.

This construction of the language used in the indictment gives force to every word employed, any other construction must necessarilly destroy either the language "languish and languishing," or the words "did instantly die."

Indictments are always construed against the pleader, and if effect can be given to all parts of any written instrument, it should be so construed as to give such effect. "A charge that A on such a day, at etc., made an assault upon B, and him with a knife, feloniously struck, killed and murdered, was held not to import sufficiently that the stroke was at the same time and place as the assault for want of the words 'then and there.'"

1st Russell on Crimes, 2 Am. Ed., Marg. p. 470.

1 Wharton's Cr. Law, 6th Ed., Sec. 272.

1 Bishop's Cr. Pro., 3d Ed., Secs. 407, 413.

The languaged used in the indictment, "did instantly die," is not sufficient.

1 Wharton's Cr. Law, 6th Ed., Sec. 272.

1 Bishop's Cr. Pro., 3d Ed., Sec. 409.

Laster vs. State, 9 Mo., 658.

2d. Said indictment fails to allege that Box died of the wounds charged to have been inflicted. The language, "of which mortal wound the said William T. Box did languish and languishing did then and there die," is not sufficient. Box may have died from causes other than the wound, and yet if all the allegations in the indictment be true it does not say he died of the wound. It does charge that he languished of the mortal wound.

From the earliest writers of the common law to the present day no precedent of indictment for murder can be found that does not distinctly and clearly charge the death to have resulted from the wound or bruise inflicted. It

must be alleged that the wound was mortal and that the party died of the mortal wound.

1st Starke's Crim. Pl., 93.

In all cases the death by the means stated must be positively alleged and cannot be taken by implication and therefore where the means of death is alleged to be by a stroke, the indictment should proceed to aver that the prisoner thereby gave to the deceased a mortal wound of which he died.

1 East P. C., 342.

1 Arch. Cr. and Pl. Pomeroy's Ed., p. 791.

Anon 1 Roll. Rep., 137.

Hawk T. C. Bk. Sec. 83.

Chit. Crim. Law, 736.

British Crim. Cases, 298.

United States vs. Cruikshank, 92 U. S., 542.

If the indictment may be true and still the accused may not be guilty of the offense as it is described in the law, the indictment is insufficient.

Com. vs. Young, 15 Grat., 664.

32 Fed. Rep., page 694.

U. S. vs. McCormick, 1 Crouch C. C., 593.

12 Myer's Fed. Decisions, Sec. 2078.

In the present case the indictment may be true and plaintiffs in error not guilty of murder. Box may have been mortally wounded by a gunshot wound fired by plaintiffs in error. He may have languished of the wound and died, but not of the mortal wound inflicted.

United States vs. Carel, 105 U. S., 611.

United States vs. Simmons, 99 U. S. 360.

United States vs. Hess, 124 U. S., 483.

The rule, says Mr. Clifford, J., in U. S. vs. Crook, 17 Wallace, 174, is universal that every ingredient of which the offense is composed must be accurately and clearly stated in the indictment, or the indictment will be quashed on motion, or the judgment may be arrested or reversed on error.

Edmonds vs. State, 41 Tex. Rep., 496.

The State vs. Blan, 69 Mo., 317, 322.

People vs. Wallace, 9 Cal., 30.

People vs. Loyd, 9 Cal., 54.

It is well settled that the defect being matter of substance and not of form only is not cured by verdict and advantage may be taken of the omission by motion in arrest of judgment. 105 U. S., 611. and 124 U. S., 483, already cited.

Criminals courts of law are not at liberty to make intendments and inferences to support indictments in the same manner as they may do to support civil actions.

United States vs. Davis, 5 Mason, 356.

United States vs. Slenker, 32 Fed. Rep., 691.

The want of specific material allegations is not aided by the concluding summary in the indictment.

Shaffer vs. State, 35 N. W. Rep., 372.

Fouts vs. Territory, 8 O. St., 98.

We beg to call the attention of the court to the fact

that the original record filed in this court shows that plaintiffs in error duly excepted to the errors herein presented, at the trial of this case in the court below. Wherefore plaintiffs in error pray that this court do hear and reverse this case, with such other orders as in law and justice they are entitled.

J. C. HODGES,
C. H. SMITH,
A. J. NICHOLS,
For Plaintiffs in Error.

Office Supreme Court U. S.
FILED.
MAR 7 1896
JAMES H. McKENNEY,
CLERK

IN SUPREME COURT

FOR THE UNITED STATES OF AMERICA,

OCTOBER TERM, 1895.

No. 461.

M. F. BALL, J. C. BALL, and R. E BOUTWELL,
Plaintiffs in Error.

Versus,

THE UNITED STATES,
Defendant in Error.

Error to the Circuit Court of the United States for the Eastern District of Texas.

Brief of J. C. HODGES,
And C. H. SMITH,
Att'ys for Plaintiffs in Error.

P. H. Bonnett, Print. Paris, Texas.

IN SUPREME COURT

FOR THE UNITED STATES OF AMERICA,

OCTOBER TERM, 1895.

No. 812.

M. F. BALL, J. C. BALL, and R. E BOUTWELL,

Plaintiffs in Error.

Versus.

THE UNITED STATES,

Defendant in Error.

Error to the Circuit Court of the United States for the Eastern District of Texas.

General Statement:

On October 17, 1889, plaintiffs in error were indicted in the Circuit Court of the Eastern District of Texas, for the murder of William T. Box, on June 26, 1889, in Pickens county, I. T., it being indictment No. 3 in said court. On November 3, 1889, after a trial, a verdict was returned, finding J. C. Ball and R. E. Boutwell guilty as charged in the indictment, and M. Filmore Ball not guilty,

and an order was entered that J. C. Ball and R. E. Boutwell were guilty as charged in the indictment, and remanding them to custody, and that M. F. Ball be discharged. On November 15, 1889, J. C. Ball and R. E. Boutwell were ordered executed, but no day was named for the execution and no death warrant ordered. On June 18, 1890, J. C. Ball and R. E. Boutwell were again sentenced to be hung. (Record, page 124).

From the order of June 18, 1890, J. C. Ball and R. E. Boutwell sued out a writ of error and brought their cases to this court. On April 27, 1891, this court, in an opinion reported in 140 U. S. Reports, 118, held that the orders of November 15, 1889, and of June 18, 1890, were erroneous, in that they do not disclose that plaintiffs in error were present when they were entered; that the indictment in said cause, failing to allege when the deceased died, was insufficient to charge murder, but sufficiently charged assault, and ordered that "the judgments are reversed and the cause remanded, with a direction to quash the indictment, and for such further proceedings in relation to the defendants as to justice may appertain." On November 21, 1891, indictment No. 3 was dismissed.

On May 7, 1891, plaintiffs in error were again indicted for the murder of William T. Box on June 26, 1889, in the Indian Territory, it being indictment No. 230 in said court. On April 23, 1894, M. F. Ball filed a plea of *autre fois acquit*, to said indictment, setting up the identity of the offense charged and his acquittal on in-

dictment No. 3, and that William T. Box was dead when indictment No. 3 was returned, an that an offense is well charged in the same, on the same day J. C. Ball and R. E. Boutwell filed their pleas of *autre fois convict* to said indictment, setting up therein the identity of the offenses charged and their conviction on indictment No. 3, their confinement in jail until indictment No. 230 was presented; that an offense is well charged in indictment No. 3; that William T. Box was dead when indictment No. 3 was returned, and that the government had carved one offense out of the transaction. On May 1, 1893, on motion of the district attorney to strike out said pleas and demurring to them on account of the insufficiency of indictment No. 3, the Circuit Court overruled and denied said pleas.

On April 30, 1894, M. F. Ball filed a plea to the jurisdiction of the court, alleging that he and the deceased were both members of the Chickasaw tribe of Indians.

On May 1, 1894, the several motions of plaintiffs in error for severance were denied, and a trial had, which resulted in a verdict on May 5, 1894, against all special pleas and the conviction of all three of the plaintiffs in error of murder.

Motions for new trial and in arrest of judgment were filed and overruled by the court and plaintiffs in error sentenced to death. Plaintiffs in error excepted, filed petition for writ of error, assigned errors and bring their

cases to this court for review. Record, pages 3 to 16, inclusive, will verify the statement here made.

We will first consider the third and fifteenth assignments of errs together.

Assignment of Error:

III.

"The court erred in sustaining the motion made by the district attorney to strike out the special plea of former jeopardy and former acquittal of the defendant M. F. Ball filed herein on the 25th day of April, A. D. 1894, which said special plea and motion to strike out the same are made parts of the record herein, here referred to and made a part hereof, (Record, pp. 3, 9 and 11) because said special plea showed that the said defendant M. F. Ball had, before the indictment in this case had been presented in this court, been legally tried by a jury duly and legally empaneled in a court of competent jurisdiction, to-wit: in the Circuit Court of the United States, in and for the Eastern District of Texas, at Paris, Texas, for the same offense charged against him in this cause, to-wit: for the shooting, wounding, killing and murdering of William T. Box, and by said jury found not guilty of said offense, and by said court discharged by its judgment entered of record." (Record, 140).

Assignment of Error:

XV.

"Because the court erred in failing to give to the jury the special charges Nos. 1 and 2, asked by the defendant M. F. Ball, and which said special charges are as follows:

"1st. If you believe from the evidence in the case that the defendant M. F. Ball is the same M. F. Ball named in indictment No. 3 introduced in evidence herein, and that a jury duly selected, empaneled and sworn to try him upon said indictment returned a verdict of not guilty against said M. F. Ball, and if you further believe from the testimony in this case that the said M. F. Ball was charged in said indictment No. 3 with the same transaction and offense as charged in the indictment in this case, i.e., if you believe that he, the said M. F. Ball, was charged in said indictment No. 3 with the shooting, wounding, killing and murdering of Wm. T. Box, in Pickens county, Chickasaw Nation, Indian Territory, and if you further believe that Wm. T. Box was dead at the time said indictment No. 3 was returned against said M. F. Ball, and that that fact was known to the government's prosecuting officer who drew said bill of indictment No. 3, at the time he so drew the same, then you are charged that the said M. F. Ball has been once placed in jeopardy for the shooting, wounding, assaulting, killing and murdering of Wm. T. Box, and you will find the defendant M. F. Ball's

plea of former acquittal to be true and find him not guilty upon the indictment herein." (See Record, p. 133).

"2d. You are instructed that under the evidence and admissions in this case, the defendant M. F. Ball has been heretofore tried and acquitted of the killing and murdering of Wm. T. Box, and by a valid judgment of this court discharged of said offense which said judgment has been in no way set aside, annulled, or otherwise vacated or appealed from; you will therefore find the said M. F. Ball's plea of former acquittal and former jeopardy to be true and acquit him herein." (See Record, p. 134).

And the court erred in his general charge, wherein he charged the jury in this case as follows, to-wit:

"The defendant Filmore Ball has further pleaded that he has been tried heretofore in this court on an indictment charging him with the murder of Box, and was acquitted. The facts are admitted that he was so tried, and he pleads former acquittal in bar of this prosecution. Upon that plea you are instructed that the Supreme Court of the United States has decided that the indictment was defective in so far as it attempted to charge the offense of murder, and the defendant's plea of former acquittal would not be good, and you would find against him. In other words, parties indicted upon a defective indictment could not plead a former conviction or acquittal, and you are instructed to find against that plea." (See Record, p. 129).

Because it was admitted upon the trial of this cause that the offense charged in indictment No. 3, returned into

the Circuit Court of the United States, in and for the Eastern District of Texas, at Paris, Texas, on the 17th day of October, A. D. 1889, by a grand jury duly empaneled in said court, which said indictment is made a part of the record in this cause and here referred to, and indictment No. 230, returned into said court on the 17th day of May, A. D. 1891, and upon which these defendants have been tried and convicted in this case, is for one and the same transaction and offense—that is to say, for the killing and murdering of Wm. T. Box by the defendants herein, M. F. Ball, J. C. Ball and R. E. Boutwell, and that the said M. F. Ball, J. C. Ball and R. E. Boutwell, named in indictment No. 3, are the same M. F. Ball, J. C. Ball and R. E. Boutwell named in indictment herein No. 230, and not other and different parties; and the uncontroverted evidence in the case, which was admitted without objection from the government, showed conclusively that the defendant M. F. Ball was tried in this court upon indictment No. 3, and acquitted of said offense prior to the time indictment No. 230 herein was returned against him, and he, said M. F. Ball, placed once in jeopardy of life and liberty and acquitted of said offense in a court of competent jurisdiction and by a judgment of said court, made and entered, discharged. (Record, page 145).

Statement:

M. F. Ball's sworn plea of *autre fois acquit* was as

follows: "And now comes M. F. Ball, one of the defendants in the above cause, and for special plea herein says:

First. That heretofore, on or about the 30th day of November, A. D. 1889, he was tried and acquitted at Paris, Texas, in a court of competent jurisdiction, to-wit: In the Circuit Court of the United States, for the Eastern District of Texas, upon and indictment, numbered 3 in said court, duly and legally presented therein, charging this defendant jointly with J. C. Ball and R. E. Boutwell, with the same identical offense that is charged in indictment No. 230 herein, and upon which he is now called to answer. That indictment No. 3, aforesaid, charged this defendant and his co-defendants with the same identical overt acts, i.e., shooting William T. Box, that they are now charged with in indictment No. 230 herein.

Second. That he was duly arraigned and pleaded not guilty to the charge in the said indictment No. 3; that thereupon he was tried before a jury of twelve men, duly and legally selected, empaneled, and sworn to try the issue so joined, in the United States Circuit Court for the Eastern District of Texas, holding session at Paris, Texas, and being the court wherein said indictment was duly and legally presented by a grand jury duly organized by said court.

Third. That on the 3d day of November, A. D. 1889, the jury so selected, empaneled, and sworn, after hearing the evidence and the charge of the court, returned into court the following verdict, to-wit: 'We, the jury,

find the defendants J. C. Ball and R. E. Boutwell guilty, as charged in the indictment, and we find M. Filmore Ball not guilty. A. P. Ball, Foreman. Nov. 3d, 1889.' The court received and filed said verdict, and then and there rendered its judgment as follows: "It is therefore ordered by the court that the defendants, J. C. Ball and R. E. Boutwell, are guilty as charged in the indictment herein and as found by the jury, and it is ordered that they be remanded to the custody of the Marshal, and be by him committed to the county jail of Lamar county to await the judgment and sentence of the court. It is further ordered that the defendant M. F. Ball be discharged and go hence without day." All of which proceedings appear upon the record of said United States Circuit Court in and for the said Eastern District of Texas, holding sessions at Paris, Texas, certified copies of said entries are hereto attached, marked "Exhibit A," and made a part hereof; which said judgment was never vacated, annulled, or set aside in any way.

Fourth. Defendant shows to the court that said indictment No. 3 aforesaid was a good and valid indictment, and charged this defendant with the commission of a felony, and in so charging charged this defendant with the same overt acts, to wit, the shooting of William T. Box, that are charged in the indictment No. 230 to which affiant now pleads.

Wherefore affiant pleads former jeopardy and former acquittal upon the same identical offense charged in the indictment in this cause.

Fifth. Defendant says that if he is mistaken as to the bill of indictment No. 3 as aforesaid, charging him and his co-defendants with the same offense charged in indictment No. 230, and the court should hold that indictment No. 3 only charged this defendant and his co-defendants with assault with intent to kill William T. Box. Then this defendant for special plea in this behalf shows to the court that the shooting and wounding William T. Box, charged in said indictment No. 3, is the same identical shooting that is charged in indictment No. 230 and is one and the same transaction; and that the said William T. Box died before the filing of the indictment No. 3 against the defendant and his co-defendants, and which fact was known to the District Attorney who drew the bill of indictment and to the Grand Jury that presented such indictment No. 3, and that by the terms of said indictment this defendant was charged with assault with the intent to kill said William T. Box, and was tried in said court and acquitted of said offense of assault to kill and all other offenses charged in said indictment. This defendant therefore charges that the United States, by its legally constituted Grand Jury, District Attorney, and Circuit Court as aforesaid, in the manner aforesaid, and without the consent of this defendant, carved out of the shooting of William T. Box the offense of an assault to kill, and tried this defendant, of which said offense he was duly and legally acquitted.

Wherefore he pleads said acquittal in bar of any further prosecution for the alleged shooting of William T.

Box, in said two indictments. (Rec. 3.)

The charging part of indictment No. 3 is, "that one M. F. Ball and one J. C. Ball and one R. E. Boutwell, whose names are to the Grand Jurors otherwise unknown, late of the county of Pickens, in the Chickasaw Nation, in the Indian Territory, the same being annexed to and constituting a part of said Fifth Circuit, and annexed to and constituting a part of the Eastern District of Texas, for judicial purposes, and being within the jurisdiction of this court did unlawfully, fraudulently, and feloniously and with malice aforethought, and with a certain deadly weapon aforesaid, in the manner aforesaid, and used as aforesaid, did unlawfully and feloniously, and with malice aforethought, and the malice aforethought of each of them, did kill and murder the said William T. Box. The said M. F. Ball and J. C. Ball and R. E. Boutwell, and each of them being there white men and not citizens of the Chickasaw Nation or of the Indian Territory, or any nation or tribe thereof, contrary to the form of the statutes of the United States of America, in such cases made and provided, and against the peace and dignity of the United States of America. (Rec. 8.)

The order and verdict returned on indictment No. 3 is:

"Sunday, November 3rd, 1889.

This day came the United States by her attorney, and the defendants in their own proper persons and by attorneys came, and the jury of twelve good and lawful men

which heretofore had been tried, empannelled and sworn as required by law, and having heard the evidence and argument of counsel and received the charge of the court, and having on a former day of this term retired to consider of their verdict, on this day brought into open court their verdict in words and figures as follows, to-wit:

"We the jury find the defendants J. C. Ball and R. E. Boutwell guilty as charged in this indictment, and we find M. Fillmore Ball not guilty. Nov. 3rd, 1889. A. P. Ball, Foreman."

It is therefore considered by the court that the defendants J. C. Ball and R. E. Boutwell are guilty as charged in the indictment herein and as found by the Jury, and it is ordered that they be remanded to the custody of the Marshal and be by him committed to the County Jail of Lamar County to await the judgment and sentence of the court.

It is further ordered that the defendant M. F. Ball be discharged and go hence without day." (Rec. 5).

The charging part of indictment No. 230 is "That one M. F. Ball and one J. C. Ball and one R. E. Boutwell, late of Chickasaw Nation, Pickens County, Indian Territory, in the District and Circuit aforesaid, on the twenty-sixth day of June, in the year of our Lord eighteen hundred and eighty nine, in Pickens County, in the Chickasaw Nation, in the Indian Territory, the same being annexed to and constituting a part of the said Fifth Circuit, and annexed to and constituting a part of the Eastern District of

Texas, for judicial purposes, and being within the jurisdiction of this court did unlawfully, fraudulently, and with their malice aforethought, and with the malice aforethought of each of them, and with a certain deadly weapon, to-wit, a certain gun by the said M. F. Ball, J. C. Ball, and R. E. Boutwell then and there held, make an assault in and upon the body of one William T. Box, with said gun held as aforesaid, said gun being then and there loaded and charged with gunpowder and leaden balls, then and there held and used as aforesaid, the said M. F. Ball, J. C. Ball, and R. E. Boutwell did then and there shoot off and discharge the contents of said gun at, in, and upon the body of said William T. Box, inflicting thereon a mortal wound, of which mortal wound the said William T. Box did languish, and languishing did then and there instantly die, and did then and there die within a year and a day after the infliction of the said mortal wound as aforesaid.

And the said Grand Jurors aforesaid, upon their oaths aforesaid, do say that upon the day aforesaid, at the place aforesaid, with said deadly weapon aforesaid, in the manner aforesaid, and used as aforesaid, the said M. F. Ball, J. C. Ball, and R. E. Boutwell, did unlawfully, feloniously, and with their malice aforethought, kill and murder the said William T. Box; the said M. F. Ball, J. C. Ball, and R. E. Boutwell, and each of them being then and there white persons, and not Indians nor citizens of the Indian Territory, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America." (Rec. 1).

The motion of the District Attorney to strike out said special plea is as follows: "Now comes the United States of America, by and through Robert E. Hannay, the United States Attorney in and for the Eastern District of Texas, and excepts to the special plea of the defendants filed herein and moves the court to strike out and hold the same for naught for the following reasons, to-wit:

First. Because the said special plea does not set forth the bill of indictment No. 3 referred to therein, and does not set forth the judgment of the Supreme Court in which said indictment is held valid for assault only, and in which said cause was remanded for further proceedings in the said Circuit Court.

Second. Because the said special plea should be made to speak the truth concerning all the proceedings which have been had in said Circuit and the said Supreme Courts in the above styled and numbered cause.

Third. Because the said defendants and none of them have been tried in the said Circuit Court upon a valid indictment for the murder of William T. Box. That the bill of indictment number 3, referred to in said special plea of the defendants, and upon which the defendants were put to trial was insufficient in law, and was void, and was in form and substance so defective that no valid judgment could have been entered of record in any course or proceeding based upon said bill of indictment.

Fourth. Because none of the said defendants have been in legal jeopardy by virtue of any proceeding upon

said void, defective and insufficient indictment, and the said defendants and none of them have been legally tried for the crime of murder, as set out in the indictment filed herein and numbered 230.

Fifth. Because whatever acquittal or conviction there may have been in the said former proceeding was void and should go for naught; and further, because no penalty has been inflicted or attempted to have been inflicted upon the said defendants, or either of them, upon any judgment or order of the said Circuit Court based upon said void proceeding; and further, because no punishment or penalty could have been legally inflicted upon said defendants, or either of them, upon any such order or indictment.

ROBERT E. HANNAY,

U. S. Attorney, E. D. T."

(Rec. 10).

The order striking out special plea is as follows:

"This day this cause came on to be heard upon the plea of former acquittal and former jeopardy interposed herein by the defendant M. F. Ball, and the argument of counsel thereon being heard and the court being fully advised, because it is the opinion of the court that the law is against the defendant, the plea is overruled and denied; to which ruling of the court defendant in open court excepted." (Rec. 11).

"It was admitted before the court and jury by all of the parties that the offense charged in the said indictment No. 3 and the offense charged in indictment No. 230 in this

case is and was for one and the same transaction and offense, i. e.. for the killing and murdering of William T. Box by these defendants, and that the defendants, M. F. Ball, J. C. Ball, and R. E. Boutwell, charged in this indictment No. 230 are the same identical J. C. Ball, M. F. Ball, and R. E. Boutwell charged and tried upon said indictment No. 3 in said Circuit Court of the United States, and not other and different persons. It was further agreed by all the parties hereto before the court and jury that no appeal was ever prosecuted from the judgment entered in said cause No. 3 as to the defendant, M. F. Ball. (Rec. 126.)

"William T. Box was killed on the night of June 26th, 1889." (Rec. 32.)

The verdict returned was, "We the jury find against the special plea of the defendant M. F. Ball as to the jurisdiction of the court, and we further find against the special plea of defendants, M. F. Ball, J. C. Ball, and R. E. Boutwell as to former trial: and we the jury find the defendants, M. F. Ball, J. C. Ball, and R. E. Boutwell, guilty of murder in the Indian country, as charged in this indictment.

D. R. Blair, Foreman."

May 5, '94. (Rec. 3.)

ARGUMENT.

Plaintiff in error M. F. Ball's plea of former acquittal should have prevailed in this case. The action of the Circuit Court in denying the plea on the motion of the Dis-

trict Attorney on account of the insufficiency of indict ment No. 3, and in instructing the jury to find against the plea because this court has held that indictment was insufficient to charge murder, clearly shows that the reason for the rejection of this plea was the insufficiency, or supposed insufficiency of the indictment to sustain it. Since the decision of Vaux's case the doctrine that an acquittal on a defective or inadequate indictment is no bar to another prosecution has been very generally accepted on the authority of that case. Vaux's case, 4 Coke R. 44; People vs. Barrett 1 Johnson 66; Com. vs. Somerville 1 Virginia cases 164, 1 Wharton's Crim. Law, Sec. 551.

It is equally well settled that an acquittal or conviction of an assault will not bar an indictment for murder, where death results from the assault after the acquittal or conviction. Com. vs. Evans, 101 Mass. 25; Com. vs. Roby, 12 Pick. 496; Burns vs. People, 1 Parker C. R., 182; 1 Wharton's Crim. Law, Sec. 567A.

The transactions being the same in both indictments, death having ensued before the presentment of indictment No. 3, some grade of assault being well charged in indictment No. 3 which is included in the offense charged in this case, the verdict of acquittal and order of discharge of M. F. Ball having been in no way vacated or set aside, is a bar to any further prosecution, and the Government is estopped by the same.

First. Indictment No. 3 charges sufficiently the of fense of assault with a deadly weapon with intent to kill, denounced in Sec. 2142 R. S.

The offense defined in Sec. 2142 is an attempt at murder at common law (2 Bishop Crim. Law, Sec. 57.) Where a murder is committed by means of a battery an assault is included in the murder (2 Bish. C. L., sec. 56), and an assault with intent to kill must necessarily be included.

In Ball vs. U. S. 140, U. S. 136, this court says of indictment No. 3, an assault is well charged. The indictment alleges the offense to have been committed "in Pickens County, in the Chickasaw Nation, in the Indian Territory," that "M. F. Ball and J. C. Ball and R. E. Boutwell, and each of them being there white men," that the assault was made "with a deadly weapon, to-wit, a certain gun." The allegation, "did unlawfully, fraudulently, feloniously and with their malice aforethought, and with a certain deadly weapon, to-wit, a certain gun, in the hands of the said M. F. Ball, J. C. Ball and R. E. Boutwell, then and there held, make an assault in and upon the body of one William T. Box with said gun held as aforesaid, said gun being then and there loaded and charged with gunpowder and leaden balls, then and there held and used as aforesaid, the said M. F. Ball, J. C. Ball, and R. E. Boutwell did shoot off and discharge the contents of said gun in and upon the body of said William T. Box, inflicting thereon ten mortal wounds, of which mortal wounds the said William T. Box did languish and languishing did die," is sufficient to charge an intent to kill (Whart. Crim. Ev. Sec. 142). The words "malice aforethought" refer to the intent; from the use of a deadly weapon in a manner likely to produce death, the law presumes the intent; and from

the infliction of mortal wounds with a deadly weapon the law presumes the intent was to kill.

"Every indictment ought, in some way, to show the evil intent, since this is an element without which crime is impossible, but some offenses are of such a sort that, *prima facie*, the evil intent appears on a mere statement of the act itself. (1 Bish. Crim. Prac., Sec. 525.) A killing with malice aforethought is an intentional killing, (People vs. Johnson, 1 Parker 291,) and to charge an assault and killing with malice aforethought is to charge the ingredients of assault with intent to kill.

By reason of the provisions of Sec. 1035 R. S. an assault with intent to kill is included in every indictment for murder and that offense is included in indictment No. 3. It is true that this court has held that indictment No. 3 was insufficient to charge murder, because the place of death is not alleged, but this is immaterial in the offense of assault with intent to kill. The offense of assault with intent to kill was complete when the wounds were inflicted. In Linton's case, (2 Virginia cases 205,) it is held that when the stabbing was done in Virginia and the death ensued out of the State, that the Virginia courts could try for the stabbing.

If one in the Indian Territory with a deadly weapon and of malice aforethought should inflict upon another mortal wounds, and the person so wounded should die of these wounds beyond the limits of the United States, the person inflicting such wounds would certainly be guilty of

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an offense cognizable in the Circuit Court having jurisdiction over that country; it would not be murder, on account of the place where death ensued, but must be an assault with intent to kill. Now indictment No. 3 does not sufficiently charge murder, but it does charge well whatever offense it is, to inflict mortal wounds with malice aforethought on one, who dies beyond the limits of this country —assault with intent to kill, attempt at murder. Hence the rule, that an acquittal on an insufficient indictment will not bar another prosecution, has no application in this case.

Second. An acquittal on a valid indictment for assault with intent to kill, presented after death ensues from the assault, is a bar to a prosecution for murder.

The doctrine of Merger does not obtain in this court, (2 Wharton's C. L., Sec 2294; 1 Wharton's C. L., Sec. 564; R. S., Sec. 1035.

A former conviction or acquittal of a minor offense is a bar to a prosecution for the same act charged as a higher crime, whenever the defendant on trial of the latter might be legally convicted of the former had there been no other prosecution. (King vs. Vandercomb & Abbott, 2 Leach C. C. 708; 2 Bennett & Heard's Crim. Cases, 558 Note; People vs. Ny Sam Chung, 94 Cal. 304; 1 Herman Estoppel, see 416; State vs. Cooper, 1 Greene (N. J.) 361; State vs. Lewis, 2 Hawks. 98; State vs. Shepherd, 7 Conn. 54; State vs. Cross, 101 N. C., 770.) In the dissenting opinion of Justice Gray in Sparf vs. U. S. 156, U. S. 63,

it seems to be recognized that a conviction for assault may be had on a trial for murder.

At common law the rule was that when an indictment charged an offense which included within it a less offense, or one of lower degree, the defendant though acquitted of the higher offense might be convicted of the lesser, subject to the qualification that on an indictment for felony, the defendant could not be convicted of a misdemeanor. The reason of this qualification in England was that certain privileges were accorded to one charged with misdemeanor not accorded to one charged with felony. (1 Bish. Crim. Law, sec. 400. The reason ceasing to exist in this country the qualification was disregarded in New York, People vs. White, 22 Wend. 175; in Vermont, State vs. Scott, 24 Ver. 129; in New Jersey, State vs. Johnson, 1 Vroom 185, and in other States.

This qualification on the common law rule is in effect abolished by Sec. 1035 R. S.

The offense of assault with intent to kill is a felony. (Sec. 2142 R. S.) The fact that the offense is called by a different name in the second indictment is immaterial provided it is the same criminal act. (Moore vs. State, 71 Ala. 307; Holt vs. State, 38 Ga., 187; State vs. Layton, 25 Iowa 193; Hirshfield vs. State, 11 Tex. App. 207.

Mr. Wharton lays down the test to be "where the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the

first, the plea is generally good." (1 Wharton Crim. Law, sec. 564 and 566; People vs. Ny Sam Chung, 94 Cal. 304.

Tested by this rule an acquittal of an assault with intent to kill will bar an indictment for murder.

Another principle, while not universally, is very generally recognized, that the prosecutor may carve out as large an offense as he can, but he can carve only one, is applicable to the facts of this case. (Thomas vs. State, 40 Tex. 36; 1 Bish. Crim. Law, Sec. 1060; Drake vs. State, 60 Ala. 42; Wright vs. State, 9 Tex. App. 349; State vs. Smith, 43 Vt. 324; Roberts vs. State, 58 Am. Dec., 536 note. When a greater offense includes a lesser one, being placed in jeopardy under an indictment for the included offense only, constitutes a bar to a prosecution for the greater offense. (Roberts vs. State, 14 Ga. 8; Hickey, 23 Ind. 21; State vs. Murray, 55 Iowa 530; Com. vs. Squire, 1 Metc. (Mass.) 258; Com. vs. Bosworth, 113 Mass. 200; State vs. Snyder, 50 N. H. 150; State vs. Buzzell, 58 N. H. 257; People vs. Smith, 57 Barb., (N. Y.) 46; State vs. Lewis, 2 Hawk. (N. C.) 98; State vs. Miles, 26 Minn. 381.

A conviction for petit larceny is a bar to a subsequent prosecution for grand larceny on the same facts. (Southworth vs. State, 42 Ark. 270; State vs. Murray, 55 Iowa 530.) A verdict of acquittal is itself a bar though there be no judgment upon it. (11 Am. and Eng. Encyc. of Law 956; 1 Whart. Crim. Law, Sec. 540 and 587; People vs. Smalling, 94 Cal. 112.)

"If the offense of murder had been completed by the death of the injured party at the time of indictment found, then the assault would be included in the murder, and the state could carve but one offense out of the transaction, and if, in such case, the indictment be for an assault, a conviction or an acquittal there under would be a bar to a prosecution for any grade of homicide. Curtis vs. State, 22 Tex. App., 237.

"Some apparent authority, therefore, English and American, that a jeopardy for the less will not bar an indictment for the greater, must be deemed unsound in principle. (1 Bish. Crim. Law, Sec. 1057, and authorities cited.)

Third. Another reason no less impeachable why M. F. Ball's plea of former acquittal should prevail in this case is, that he was in fact acquitted on the merits and not upon a technical defect in the indictment.

Two of the leading cases usually cited in support of the doctrine that an acquittal on an insufficient indictment will not bar another prosecution. Vaux's case and People vs. Barrett supra, do not support many of the decisions made on their authority. In Vaux's case the first acquittal was on account of the defect in the indictment; while in Barrett's case this is not true, still that case was decided by a divided court, the dissenting opinions are strong, and in neither of these, and in few, if any, of the cases in which this question has been passed upon, has the acquittal been upon the merits. In 2 Hale's Pleas of the Crown 248, in

cases of this kind, we find the doctrine "that it shall be presumed that the judgment of acquittal was given upon the defect in the indictment, and not upon the verdict," and many cases holding that an acquittal on a defective indictment is no bar rest on this principle; but certainly no such presumption arises in a case like this where three men were jointly charged and each charged in the same allegations with an offense, and two were convicted and one acquitted. It occurs to us that there is at least room for a distinction between those cases, where an acquittal is had by reason of a defect in an indictment, and those cases where the defect is an accidental concomitant of the acquittal. M. F. Ball was acquitted of murder upon the merits. At his trial it was in the mind of no one that he was simply charged with an assault. Further, M. F. Ball was *non coram judice* in the interpretation of indictment No. 3 by this court.

The authorities that support the doctrine, that an acquittal on the merits on a defective indictment, is a bar to further prosecution are somewhat meager. Note under R. vs. Vandercomb, 2 Bennett & Heard's Crim. Cases, 555 and authorities cited. Note under Roberts vs. State, 58 Am. Dec. 538; Hurt vs. State, 25 Miss. 378; Wood vs. Southwick, 97 Mass. 356; Com. vs. Keith, 8 Metc. 532; Com. vs. Loud, 3 Metc. 328; Croft vs. People 15, Hun. (N. Y.) 484; Burns vs. People, 1 Park (N. Y.) 182; State vs. Spear, 6 Mo. 644.

A trial on the merits irrespective of defects in indict-

ments is made a bar to another prosecution in some of the States by statute. In Miss. How. & Hutch., 690, sec. 5.

Fourth. A further observation in this regard is, that the prosecution is estopped by the verdict of acquittal of M. F. Ball. (1 Whar. Crim. Law, sec. 751A; 1 Bish. Crim. Law, sec. 1021.)

The principle involved in the plea of former acquittal is one of the strong bulwarks of liberty, it is embedded in the very foundations of our criminal jurisprudence, and, being a remedial provision of the organic law, is liberally construed. (11 Amer. and Eng. Encyc. of Law 927.)

In this case innocence had been established on the merits, by the verdict of a jury, the defect in the indictment was unknown in the trial court, and we submit that M. F. Ball's plea of former acquittal should have prevailed.

The fourth and seventeenth assignments of error presenting the same question, will be considered together.

Assignment of Error:

IV.

"The court erred in sustaining the motion made by the district attorney to strike out the special plea of former jeopardy and former conviction of the defendants J. C. Ball and R. E. Boutwell, filed herein on the 25th day of April, A. D. 1894, which said special plea and motion are made parts of the record in this case, here referred to and made a part hereof, because said special plea of said

defendants showed that the matters charged in indictment No. 3, presented in the Circuit Court of the United States, Eastern District of Texas, and the matters charged in the indictment in this case, are for one and the same transaction and offense, to -wit: for the shooting, assaulting, kill ing and murdering Wm. T. Box; that at the time said indictment No. 3 was presented against said defendants in said court the government's prosecuting officer and the grand jury that returned the same knew that Wm. T. Box was dead; that the government, through its duly constituted grand jury and prosecuting officer did, by the finding and presenting of said indictmet No. 3 in said Circuit Court, in and for the Eastern District of Texas, (which said indictment No. 3 is a part of the record in this case, here referred to, and made a part hereof) carve out of the shooting, assaulting, killing and murdering of said Wm. T. Box a lesser offense than that of murder—that is to say, the government, through its said grand jury and prosecuting officer, carved out of said shooting, assaulting, killing, and murdering of Wm. T. Box, by the presentation of said indictment No. 3 in said court, the offense of an assault to kill and murder the said Box, and upon said indictment No. 3 the defendants J. C. Ball and R. E. Boutwell were placed upon trial in said Circuit Court, before a jury duly selected, empaneled and sworn, and a verdict of guilty of said offense returned against them by said jury, upon which a judgment of said court was pronounced and entered against them, adjudging

them, the said J. C. Ball and R. E. Boutwell, guilty of said offense, and said defendants thereby placed once in jeopardy and the government thereby barred from prosecuting them for the crime of murder." (Rec. 140).

Assignment of Error:

XVII.

The court erred in refusing to give to the jury the special charge No. 4, asked by the defendants J. C. Ball and R. E. Boutwell, which said special charge is as follows:

"4th. If you believe from the testimony in this case that the defendants J. C. Ball and R. E. Boutwell are the same identical J. C. Ball R. E. Boutwell charged in indictment No. 3, introduced in evidence herein, and if you further believe that said indictment No. 3 charged the said J. C. Ball and R. E. Boutwell with the same transaction and offense as the indictment herein charges them with, i.e., the shooting, wounding, assaulting, and murdering of Wm. T. Box, in the Chickasaw Nation, Indian Territory, and if you further believe from the testimony that at the time said indictment No. 3 was returned against said defendants the grand jury that returned the same and the government's officer who drew said indictment No. 3 knew that Wm. T. Box was dead at the time they so drew said indictment, and that he died from the infliction of the gunshot wound charged to have been inflicted by these

defendants, and if you further believe that said defendants were arraigned, tried, and convicted upon said indictment No. 3 by a jury duly selected, empaneled and sworn, then I charge you that the defendants J. C. Ball and R. E. Boutwell were each charged in said indictment No. 3 with an assault to kill and murder the said Wm. T. Box, and that the government of the United States, through its officers aforesaid, by presenting in this court said indictment No. 3, carved out of the shooting and wounding, killing and murdering of Wm. T. Box a lesser offense than murder, to-wit: assault to commit murder, and by the empaneling and swearing the jury to try said defendants upon said indictment and in requiring said defendants to plead thereto, the government has waived its rights to prosecute said defendants for the crime of murder, and is now estopped from claiming a conviction in this case for any offense higher than an assault to murder, and you will therefore find the special plea of said defendants, pleading former jeopardy and former conviction, to be true." (Rec. 134).

And the court erred in his general charge to the jury, wherein he charged them as follows: "The defendants J. C. Ball and R. E. Boutwell have filed a plea that they were tried in this court under an indictment that was good for an assault with intent to kill and were found guilty of this offense, and consequently the court no longer has jurisdiction to try them for murder, because they say they have been convicted of a lower degree and therefore can-

not be again convicted for murder. You will find against that plea for the reason the Supreme Court held the indictment bad for murder and do not say that it charged an assault to murder, and you are instructed to find against that plea." (Rec. 129).

Because it was admitted upon the trial of this cause that the offense charged in indictment No. 3, returned into the Circuit Court of the United States, in and for the Eastern District of Texas, on tne 17th day of October, A. D. 1889, by a grand jury duly empaneled in said court, which said indictment is made a part of the record in this cause, and here referred to and made a part hereof, and indictment No. 230, returned into said court on the 7th day of May, A. D. 1891, and upon which these defendants have been tried and convicted in this case, is for one and the same transaction and offense, that is to say, for the killing and murdering of Wm. T. Box by the defendants herein; that the M. F. Ball, J. C. Ball and R. E. Boutwell named in the indictment No. 3 are the same M. F. Ball, J. C. Ball and R. E. Boutwell named in the indictment No. 230, and are not other and different persons, and the uncontroverted evidence in this case, which was admitted without any objection being made thereto, shows that the defendants J. C. Ball and R. E. Boutwell were tried upon said indictment No. 3, in the Circuit Court of the United States, in and for the Eastern District of Texas, at Paris, Texas, and convicted of the offense therein charged, prior to the time the indictment No. 230 herein

was returned into said court; that the government's officer who drew said indictment No. 3 knew at the time he drew the same, and the grand jury was aware at the time they returned the same into this court that the said Wm. T. Box was dead at that time, and that he died from the infliction of the gunshot wounds charged to have been inflicted upon him by these defendants; that said indictment No. 3 charged these defendants with an assault to kill the said Wm. T. Box, and the government, by the presenting of said indictment No. 3, carved out of the offense of shooting, wounding, assaulting, killing and murdering of said Box the lesser offense of assault to kill and murder, and was thereby estopped from presenting against these defendants indictment No. 230 herein, charging them with the higher crime, to-wit: murder. (Rec. 147).

Statement:

J. C. Ball's and R. E. Boutwell's sworn plea of *autre fois convict* was as follows: "And now come the defendants J. C. Ball and R. E. Boutwell herein, and for special plea herein the say:

First. That on the 17th day of October, 1889, the grand jury for the United States of America, empaneled in the Circuit Court for the Eastern District of Texas, holding sessions at Paris, Texas, returned and presented in said court a bill of indictment, numbered 3, against these defendants and M. F. Ball, charging them jointly with the same overt acts that are charged in the indict-

ment numbered 230 that defendants are now called to answer; a certified copy of said indictment No. 3 is hereto attached, marked "Exhibit A," for identification and made a part hereof; that the facts and acts charged in said indictment No. 3 are the same identical acts and transactions charged in the indictment No. 230 herein.

Second. On the 30th day of October, A. D. 1889, these defendants and their co-defendant, M. F. Ball, was arraigned and placed on trial in said Circuit Court of the Eastern District of Texas, upon all the charges and offenses charged in said indictment No. 3, as will appear from a certified copy from the record of said court hereto attached, marked "Exhibit B," for identification and made a part hereof.

Third. On the 3d day of November, A. D. 1889, the jury empaneled in said court in said cause returned into court a verdict, in words and figures as follows, viz: 'We, the jury, find the defendants J. C. Ball and R. E. Boutwell guilty as charged in the indictment, and we find M. Filmore Ball not guilty. Nov. 3d, 1889. A. P. Ball, foreman.'

Fourth. Said verdict was received in said cause without any objection from either of the defendants and by the court ordered filed and the jury discharged. Upon the return of said verdict the court then and there entered its judgment in words and figures as follows, to-wit: 'It is therefore considered by the court that the defendants, J. C. Ball and R. E. Boutwell, are guilty as charged in the

indictment herein and as found by the jury, and it is ordered that they be remanded to the custody of the marshal and be by him committed to the county jail of Lamar county to await the judgment and sentence of the court. It is further ordered that the defendant M. F. Ball be discharged and go hence without day.' All of which is apparent from the record in said cause, certified copies of which are hereto attached, marked "Exhibit C," and made a part hereof.

Fifth. Defendants allege that they were by virtue of said verdict and judgment or order remanding said defendants to jail to await the judgment and sentence of the court, held in Lamar county jail until the present indictment No. 230 was presented and filed against these defendants and their co-defendant M. F. Ball, after which time said cause number 3 was dismissed without the knowledge or consent of these defendants, and they were then required to give bond to answer the charge in said indictment No. 230.

Sixth. Defendants show to the court that said indictment No. 3, aforesaid, charged these defendants and their co-defendant with unlawfully, and with malice aforethought, shooting and wounding William T. Box; that said indictment was a good and sufficient indictment, fully charging them and each of them with the offense of assault with intent to kill; that the shooting and wounding William T. Box, charged in said indictment No. 3, is the same identical shooting and wounding of William T. Box

as charged in indictment No. 230, that they are now called upon to answer, and is one and the same shooting, and one and the same time, place and transaction; that if said William T. Box ever died from gunshot wounds as charged in said indictment No. 230, that he died before the said indictment No. 3 aforesaid, was presented, which fact was known to the district attorney who drew the bill of indictment and to the grand jury that presented same before the same was presented; that the facts proven upon the trial of these defendants upon indictment No. 3 showed that Box was dead at the time they were tried on said indictment, charging them with an assault with intent to kill William T. Box, by reason of which presentation of said indictment No. 3 and the empaneling and swearing the jury and arraigning these defendants for trial aforesaid, defendants say they were put in jeopardy for the same offense which they are now called to answer; that since the death of the said William T. Box, the government, by its legally constituted grand jury and Circuit Court aforesaid, and without the consent of either of these defendants, carved out of the shooting and wounding of William T. Box the offense of an assault with intent to kill, and tried and convicted these defendants, from which said conviction for an assault with intent to kill these defendants have never appealed; that if the court trying these defendants failed to render judgment upon the verdict of the jury finding these defendats guilty of an assault with intent to kill as charged in indictment No.

3, it is no fault of these defendants; that they nor either of them has ever objected to a legal judgment being rendered upon said verdict finding defendants guilty as charged in said indictment No. 3.

All the objections the defendants ever made to the judgment of the court trying them was to the judgment sentencing them to death, which said judgment was not supported by the indictment and verdict of the jury; that there is no order or judgment of this court vacating and setting aside said verdict unless the same was vacated and rendered void by the action of this court in dismissing said case No. 3, aforesaid.

Wherefore these defendants plead specially said facts in bar of further prosecution for the alleged shooting and wounding William T. Box, and pray that they be discharged and go hence without day.

Before the undersigned authority personally appeared J. C. Ball and R. E. Boutwell, who, each on oath, for himself, says that he is the identical person named in the above and foregoing plea, and who is charged by indictment No. 230 with the murder of William T. Box; that the facts and allegations stated in said plea are true. (Rec. 6).

The order denying said plea is as follows:

This day came on to be heard the special plea of former jeopardy interposed herein by defendants J. C. Ball and R. E. Boutwell, and the argument of counsel thereon being heard and the court being fully advised, because it

is the opinion of the court that the law is against the defendant, the plea is overruled and denied; to which ruling of the court the defendants in open court excepted. (Rec. 11).

Indictment No. 3 was dismissed Nov. 21, 1891. (Rec. 126.)

For further statement, see statement under foregoing assignments.

Proposition:

A conviction of a minor offense included in a major offense is a bar to a prosecution for the major offense.

Argument:

Indictment No. 3 was good for assault with intent to kill, the Government carved that offense out of the transaction. J. C. Ball and R. E. Boutwell were convicted by a verdict on that indictment. Such conviction is a bar to a prosecution on another indictment based on same facts, and they could only be punished by judgment and sentence on that verdict for assault with intent to kill.

Having discussed the propositions that indictment No. 3 is a good charge of assault with intent to kill, and that the prosecution can carve but one offense out of a single transaction under assignment three supra, and after observing that the rules applying to autre fois acquit and autre fois convict are practically the same, we will now proceed to show, (1) that the verdict of conviction is valid:

(2) that it referred to whatever offense was well charged in indictment No. 3; (3) that the fact that a proper judgment was not entered does not effect the validity of the plea; (4) that the dismissal after verdict is equivalent to an acquittal.

The verdict finding J. C. Ball and R. E. Boutwell guilty as charged in indictment No. 3, although returned on Sunday, was a valid verdict. 1 Bish. Crim. Proc., Sec. 1001 and authorities cited.

The verdict referred to the offense well charged in the indictment, assault with intent to kill. 1 Chitty's Crim. Law, 449A. Fletcher vs. U. S. 9 Fed. Cases 274.

The fact that improper judgment was attempted to be entered does not affect the validity of the plea of former conviction. Shepherd vs. People, 25 N. Y. 406; Hartung vs. People, 28 N. Y. 40; Ratzky, 29 N. Y. 124; King vs. Bourne, 1 Bennett & Heard's Leading Crim. Cases, 376 and note; King vs. Ellis, 1 B. & H. Leading Crim. Cases, 372.

The dismissal of indictment No. 3 after verdict of conviction is equivalent to an acquittal.

Fletcher vs. U. S. 9 Fed. Cases 274; 1 Whar. Crim. Law, Sec. 544 and 513; State vs. Elden, 41 Me. 165.

Plaintiffs in error J. C. Ball and R. E. Boutwell suggest that they do not now and never have complained at indictment No. 3, nor the verdict rendered thereon, that on the former appeal they urged that said indictment was insufficient to support the sentence of death pronounced

against them on that verdict, but the sentence of death was the order appealed from and the one they asked to have reversed. We submit that the plea of former conviction was admissible.

Assignment of Error:

II.

The court erred in refusing to first try the special plea of this defendant M. F. Ball to the jurisdiction of the court before these defendants were required to announce ready upon the merits of the case (which said special plea is made a part of the record herein, here referred to and made a part hereof,) because by submitting said special plea to the jury, together with the other issues in the case, there was created before said jury a multiplicity of issues, was liable to mislead and confuse them, and, by hearing all of the facts, prejudice them against the said M. F. Ball, and thereby influence said jury in finding against his said special plea. (Rec. 140.)

Statement:

The sworn plea of M. F. Ball, filed April 30, 1894, was as follows:

"And now comes M. F. Ball, one of the defendants in the above-entitled and numbered cause, and says the Government ought not further prosecute this cause against this defendant, because he says that the crime charged against this defendant is not an offense against the laws of the United States, and that this court has no jurisdiction

to try him for said alleged offense, for the reason that the deceased, William T. Box, and this defendant were each citizens of the Chickasaw Nation and members of the tribe of Chickasaw Indians at the time the offense is alleged to have been committed, and the crime alleged in the indictment was committed, if at all, in the said Chickasaw Nation, Indian Territory.

"Wherefore this defendant says that this court has no jurisdiction to try this defendant for the crime charged against him herein; and he prays that he be discharged and go hence without day." (See Record 11.)

Plaintiff in error excepted to the refusal of the Court to try said plea before they were required to answer to the merits. (Record 30.)

ARGUMENT.

The plea to the jurisdiction was not excepted to; it was sufficient to raise the question and plaintiff in error M. F. Ball was entitled to have it heard and determined before he was required to plead to the general issue. 4 Blackstone Com. 338; 1 Chitty's Crim. Law 439; 4 Wentworth 70; 2 Hale 286.

Assignment of Error:

I.

The court erred in overruling these defendants' amended motion in arrest of judement, filed herein on the 6th day of June, A. D. 1894, and in not setting aside the

judgment entered against the defendants and in not quashing the indictment upon which these defendants were tried and convicted, because said indictment charged no crime under the laws of the United States, will not support the verdict of the jury finding them guilty of murder and the judgment of the court adjudging them each guilty of that offense, and because said indictment is fatally defective in this:

First. Said indictment fails to allege upon what part of the body of deceased the fatal wounds were inflicted and fails to give any description of said fatal wounds.

Second. Said indictment fails to allege that deceased, Wm. T. Box, died of the wounds charged to have been inflicted upon his body by these defendants.

Third. Said indictment fails to allege that the deceased, Wm. T. Box, was killed by these defendants, or either of them, at a place within the sole and exclusive jurisdiction of the United States.

Fourth. Said indictment fails to allege facts sufficient to show that the Circuit Court of the United States in and for the Eastern District of Texas, at Paris, Texas, had jurisdiction to try these defendants, or either of them, for the killing and murdering of deceased, Wm. T. Box, in that it does not aver that the deceased, Wm. T. Box, or either of these defendants were not, at the time said deceased was killed, members of any tribe of Indians in the Indian Territory, by marriage or adoption, but simply avers that these defendants were not citizens of the Indian

Territory.

Fifth. Said indictment fails to allege that the deceased, Wm. T. Box, died within the jurisdiction of the Circuit Court, in and for the Eastern District of Texas. (Rec. 139).

Statement:

The motion of plaintiffs in error was as follows:

Now comes the defendants, M. F. Ball, J. C. Ball and R. E. Boutwell, and leave of the court first had and obtained, file their amended motion in arrest of judgment in lieu of their motion filed herein on the 17th day of May, A. D. 1894, and each move the court to arrest the judgment heretofore entered against them, adjudging them guilty of murder, because the indictment in the case upon which these defendants were tried and convicted is insufficient in law and fatally defective in the following particulars, viz:

First. Said indictment fails to allege that Wm. T. Box died of the mortal wounds inflicted by these defendants in and upon his body.

Second. Said indictment fails to give a description of the mortal wounds inflicted in and upon the body of Wm. T. Box by these defendants, and fails to allege upon what portion of his body said mortal wound was inflicted.

Third. Said indictment fails to allege that the offense with which these defendants stand charged was committed at a place within the sole and exclusive jurisdiction of this court.

Fourth. Because there is no allegation in the indictment showing that this court has jurisdiction to try these defendants for the offense alleged, in that it does not aver that the deceased, Wm. T. Box, and each of these defendants were not members of any tribe of Indians in the Indian Territory, by marriage or adoption.

Fifth. Because there is no allegation in the indictment that Wm. T. Box died within the jurisdiction of the Eastern District of Texas.

Wherefore these defendants pray that the judgment heretofore entered against them be arrested, set aside, and held for naught, and that the indictment herein be quashed. (Rec. 16).

On June 15, 1894, said motion in arrest of judgment was overruled by the court in the following order:

"This day came on to be heard the defendant's motion in arrest of judgment herein, and the argument of counsel having been heard, because it is the opinion of the court that the law is against the defendants, the motion is overruled; to which ruling of the court, the defendants then and there in open court excepted." (Rec. 18).

See copy of indictment 230 under assignment three.

ARGUMENT.

The indictment in this case is insufficient, in that every element of murder is not clearly charged. (1 Chitty Crim. Law, 172).

First. The indictment fails to allege that Box died of the mortal wounds inflicted by plaintiffs in error.

The language, "of which mortal wounds the said William T. Box did languish and languishing did then and there die," is not sufficient. Box may have died from other causes than the mortal wound; it does allege that he languished of the mortal wound, but not that he died. We find no precedent wherein it is not distinctly averred that death was of the wound.

It must be alleged that the wound was mortal and that the party died of the mortal wound. (2 Hale, 137; 1 Russell on crimes, 560; People vs. Lloyd, 9 Cal., 54).

In all cases the death by the means stated must be positively alleged and cannot be taken by implication and therefore where the means of death is alleged to be by a stroke, the indictment should proceed to aver that the prisoner thereby gave to the deceased a mortal wound of which he died. 2 Bish. Crim. Proc. Sec. 514; 1 East P. C., 341; State vs. Williams 36 Texas, 352; 2 Bishop Crim. Proc., Sec. 527; West vs. State 48 Ind. 483; Hawk. P. C., Sec. 83, Chap. 23.

If the indictment may be true and still the accused may not be guilty of the offense as it is described in the law, the indictment is insufficient. Com. vs. Young, 15 Grat. 664; U. S., vs. Slenker, 32 Fed. Rep. 694.

In the present case the indictment may be true and plaintiffs in error not guilty of murder. Box may have been mortally wounded by a gunshot wound fired by plaintiffs

in error, he may have languished of the wound and died, but not of the mortal wound inflicted. United States vs. Carll. 105. U. S., 611; United States vs. Hess. 124 U. S. 483.

The rule says Mr. Clifford, Jr., in U. S., vs. Crook 17 Wallace, 174, is universal that every ingredient of which the offense is composed must be accurately and clearly stated in the indictment; or the indictment will be quashed on motion, or the judgment may be arrested or reversed on error. Edmondson vs. State 41 Texas, Rep. 496; The State vs. Blan. 69 Mo. 317, 332; People vs. Wallace 9 Cal., 30; People vs. Lloyd, 9 Cal. 54.

It is well settled that the defect being matter of substance and not of form only is not cured by verdict and advantage may be taken of the omission by motion in arrest of judgment. (105 U. S., 611 and 124 U. S., 483 already cited.)

Criminal courts of law are not at liberty to make intendments and inferences to support indictments in the same manner as they may do to support civil actions. (U. S. vs. Davis, 5 Mason 356; United States vs. Slenker, 32 Fed. Rep. 691.

The want of specific material allegations is not aided by the concluding summary in the indictment. (Shaffer vs. State 35 N. W. Rep. 372; Fouts vs. Territory, 8 O. St. 93.)

Second. The indictment fails to allege the place of death. This is an essential allegation.(Ball vs. U. S., 140 U. S. 133, and authorites cited.) The indictment at com-

mon law should aver that the deceased died in the county in which the indictment is found, where the stroke is at one time or place and the death at another, if the day be especially alleged, it must be that on which the party died and not that which he was stricken for until he died it was no murder. (Wharton on homicide, 275.)

The charge that "of which mortal wound the said Wm. T. Box did lanuguish, and languishing did then and there instantly die, and did then and there die within a year and a day after the infliction of the said mortal wound as aforesaid." is not sufficient.

The indictment does not charge "that said Box did then and there languish, and languishing did then there instantly die." This language does not allege where Box languished, but it imports that he lived after the mortal wound was inflicted, and after languishing did then and there instantly die, i. e. at the place where he languished. The language used by the pleader, "did languish and languishing did then and there instantly die," clearly imports some lapse of time after the reception ot the mortal wound before death occurred, "then and there employed in the sentence and used after the words "did languish" and refer to the time of the languishing and not to the time of the infliction of the fatal wound. The import of the language, all taken together, is plain: 1st. Box was wounded on the 26th of June, 1889, in Pickens County, Indian Territory, 2d. Box

languished and after languishing some time, he then and there, i. e., where he languished, did instantly die, and the time of death was on some date not named, but within less than a year and a day after the wound was inflicted.

This construction of the language used in the indictment gives force to every word employed, any other construction must necessarilly destroy either the language "languish and languishing" or the words "did instantly die."

A charge that A on such a day, at etc., made an assalt upon B, and him with a knife, feloniously struck, killed and murdered, was held not to import sufficiently that that the stroke was at the same time and place as the assault for want of the words 'then and there."

1 Warton's Cr. Law, Sec. 272.

1 Bishop's Cr. Pro. 408

The language used in the indictment, "did instantly die," is not sufficient.

1 Wharton's Cr. Law, Sec. 272.

1 Bishop's Cr. Pro., Sec. 409.

Lester vs. State, 9 Mo. 668.

VI.

Assignment of Error:

The court erred in overruling the written motion of the defendants J. C. Ball and R. E. Boutwell, filed herein before this case was called for trial, asking that they be awarded a separate trial from their co-defendant, M. F.

Ball, and in forcing them to be tried jointly with their said co-defendant M. F. Ball, because said motion which is made a part of the record in this cause and here referred to, stated facts sufficient to entitle them to a separate trial in this cause. (Rec. 141).

Statement:

The motion for severance was as follows:

Now come the defendants J. C. Ball and R. E. Boutwell, and pray the court to grant them a severance in this case that they may have a seperate trial from their co-defendant M. F. Ball, for the following reasons, viz:

1st. Because their said co-defendant has once been tried and acquitted of the identical offense with which he is now charged.

2d. Because the government relies on acts and declarations of M. F. Ball as evidence upon which a conviction will be asked, which acts and declarations were made after the death of William Box, the party alleged to have been murdered, which acts and declarations were not made to the knowledge of or in the presence or hearing of either of these defendants.

3d. Because the proof that will be offered by the prosecution will show that M. F. Ball was not present at the time Box was killed, and was doing no act that would onstitute him a principal in the alleged murder of Wilcliam Box.

4th. Because this court has no jurisdiction to try M.

F. Ball, as fully appears from his plea herein.

5th. Because M. F. Ball is a material witness for these defendants, and they have a right to his testimony free from the embarrassments of a defendant on trial.

Wherefore they pray that a severance be granted and that M. F. Ball be first tried. (Rec. 13).

The order refusing motion, was made May 1, 1894, was as follows:

"This day came on to be heard the motion of the defendants, J. C. Ball and R. E. Boutwell, for a severance herein, and the same having been considered, because it is the opinion of the court that the ends of the law and justice do not so demand, the motion is overruled and a severance denied." (Rec. 14).

ARGUMENT.

While it is well settled that one charged jointly with others in the commission of a crime cannot demand a severance as a matter of right, but that it is a matter that rests in the sound discretion of the court: (U. S. vs. Merchant, 12 Wharton, 480), still in refusing the motion, J. C. Ball and R. E. Boutwell were doubtless injured by the admission on the trial of testimony, which was admissible against M. F. Ball, but not against them. Further, the motion should have been granted in this case, because it would have lessened the great number of issues to be submitted to the jury, but being overruled, the following issues were submitted: The former acquittal of M. F.

Ball, M. F. Ball's plea to the jurisdiction, whether M. F. Ball was a principal or an accessory, the former conviction of J. C. Ball and R. E. Boutwell, and the issue of guilt or innocence of each of these plaintiffs in error.

Assignment of Error:

VII.

The court erred in sustaining the objection of the district attorney and in preventing the defendants from proving by the government witness Joe Cross how much he and Ed. Burney, both of whom were material witnesses for the government in this case, had paid or promised to pay Mr. Ownby for his services in assisting the district attorney in his prosecution of this case, because the same was a legitimate inquiry upon the trial of this cause, in that it tended to show the interest and feeling of said witnesses against these defendants.

Statement:

Joe Cross having testified that he and Ed. Burney employed Mr. Ownby to assist in the prosecution of this case, counsel for defendants asked, "how much do you pay him?" To which counsel for the government objected. Counsel for plaintiffs in error then stated to the court that they desired said proof for the purpose of showing the interest of the witness in this prosecution, as well as to show the interest of Ed. Burney, another material witness for the government, but the court sustained the

objection so made by the government, and would not permit said question to be answered, to which defendants excepted. (Rec. 48).

Joe Cross and Ed. Burney were both important witnesses for the prosecution. (Rec. 31 and 109).

ARGUMENT.

It is always competent to show the bias or interest of a witness as a circumstance affecting his credibility. State vs. Elkins, 14 S. W. Rep., 116; 1 Greenleaf's Ev., Secs. 446 and 450; Wills vs. Russell, 10 Otto, 621.

Our contention is that in no way could the extent of interest and bias of Cross and Burney be better shown than by showing the amount of money they had paid to secure the conviction of plaintiffs in error.

Assignment of Error:

X

The court erred in admitting in evidence, over the objection of these defendants, a certified copy of a marriage license under the hand and seal of the clerk of Cooke county, Texas, showing that S. C. Mayfield married Lucy O. Box prior to the time she married the defendant herein M. F. Ball (which certified copy was made a part of the record herein and here referred to), because the government thereby proved the contents of a written instrument by substitutionary evidence without showing the loss or

destruction of the original, and because said marriage license, or a certified copy thereof, was not indorsed upon the back of the indictment against these defendants, and because they had no notice whatever that the government would offer said marriage license or a certified copy thereof, in evidence against them, and because said marriage license raised an issue in this case, to-wit: the validity of the marriage of M. F. Ball with Lucy O. Box, alias Lucy O. Mayfield, which these defendants, and especiplly the said M. F. Ball, was not prepared to meet, and did not know would be raised upon the trial of this cause.

(Rec. 142.)

Statement:

The copy of marriage license was as follows:

State of Texas, Cooke County:

To any judge of the county or district court, reg-
312 ularly licensed or ordained minister of the gospel, Jewish rabbi, or justice of the peace, in and for said county of Cooke, greeting:

You are hereby authorized to solemnize the rites of marriage between Mr. C. S. Mayfield and Miss L.O. Box, and make due return to the clerk of the county court of said county within sixty days thereafter, certifying your action under this liccense.

Witness my official signature and seal of office, at office in Gainesville, this 1st day of Sept., A. D. 1881.

[SEAL.] E. F. BUNCH,
Clerk County Court Cooke Co.,
By HARRY JACKSON,
Deputy.

I, R. M. Hancock, hereby certify that on the 4th day of Sept., A. D. 1881, I united in marriage C. S. Mayfield and Miss L. O. Box, the parties above named.

Witness my hand this the 10 day of Sept., A.D. 1881.

R. M. HANCOCK, *M. G.*

(Further indorsed:) Returned and filed for record the 10 day of Sept., A. D. 1881, and recorded the 10 day of Sept., A. D. 1881. E. F. Bunch, Clerk.

(Further indorsed:) I, E. O. Perry, clerk of the county court of Cooke county, Texas, do hereby certify that the within and foregoing license is a true and correct copy of the marriage record of this (Cooke) county as the same appears in Book 2, page 557. Given under my hand and seal of office this April 30th, 1794. [Seal.] E. O. Perry, Clerk Cook Co., Tex., by Tom Perry, Deputy.

To the introduction of which each of the defendants at the time objected. First, because the Government was seeking to prove the contents of a written instrument by secondary evidence, without making any effort to produce the original and without accounting for the loss or destruction thereof; and second, because said marriage license was not indorsed upon the back of the indictment against these defendants, and neither of them had any notice whatever that the said marriage license would be introduced in evidence against them; and third, because the Government, by the introduction of said marriage license, raised a collateral issue in this case, and one which neither of these efendants had any notice would be raised in this cas-.

But the court, notwithstanding the fact that the Government made no attempt to account for the original marriage license, and notwithstanding that no notice had been given either of these defendants that said marriage license would be introduced in evidence against them or either of them, permitted the Government to introduce the same in evidence before the jury, to which judgment and ruling of the court each of the defendants at the time objected.

(Rec. 120.)

ARGUMENT.

The evidence offered was not the best evidence. The original marriage license or a person present at the ceremony would have been the best evidence. Secondary evidence is admissable only when a sufficient predicate is laid. No predicate was laid in this case.

Plaintiffs in error having no notice of the marriage license, either in the list of witnesses on the back of the indictment or otherwise, and having objected to its introduction at that time it should have been excluded. R. S., Sec. 1033; Logan vs. U. S. 144 U. S. 263; Hickory vs. U. S. 151 U. S. 303. The object of Sec. 1033, R. S., was evidently to enable a person charged with a capital crime to enquire after the character and surroundings of the witnesses that were to testify against him when he is tried for his life. No difference in principle could exits

between a document and a living witness. The wisdom of the statute is illustrated in this case, for after these plaintiffs in error were convicted, they discovered that the Mayfield mentioned in this marriage license was not competent to contract marriage, being already married. (See Rec. 25.)

Assignment of Error:

XI.

The court erred in admitting Mrs. L. O. Angling to testify, over the objections of these defendants, that "she thought she was legally married to one of these defendants, to-wit: M. F. Ball, but had learned since that she was not legally married to him, and that at the time she married the defendant M. F. Ball, her former husband, S. C. Mayfield, was living; that she had never been divorced from him, and that the defendant M. F. Ball knew that said Mayfield was living at the time she so married the said M. F. Ball," because the said defendant M. F. Ball, prior to the time said witness so testified, introduced in evidence in this case a marriage license, issued by the legal authorities of the Chickasaw Nation, Indian Territory, showing that he, the said M. F. Ball, had, prior to the time Wm. T. Box was killed, married the said witness, and said witness testified that she lived with said M. F. Ball from the time she so married him up to the time her father, William T. Box, was killed, and that she never had been divorced from him. (Rec. 143.)

Statement:

When Mrs. Angling was offered as a witness by the Government, defendants obtained permission and introduced the following marriage license: (Sup. Rec. 1.)

"Chickasaw Nation, County of Pickens:

"To any judge of the county or district court, ordained minister of the gospel in and for said county of Pickens, greeting: You are hereby authorized to solemnize the rights of matrimony between Mr. M. F. Ball and Mrs. L. O. Mayfield, and make due return to the judge of the county court within thirty days thereafter, certifying your action under this license. Witness my official signature and seal of office, Pickens county court house, this the 31st day of August, A. D. 1886.

WILLIS DICKERSON,
Judge County Court, Pickens County.

I, Willis Dickerson, hereby certify that on the 31st day of August, A. D. 1886, I United in marriage Mr. M. F. Ball and Mrs. L. O. Mayfield, the parties above named. Witness my hand, this 31st day of August, 1886.

WILLIS DICKERSON,
County Judge.

Recorded on page 105, Marriage Record of Pickens county, C. N., June 31st, 1887.

A. H. LAW, Clerk P. Co., C. N."

(Rec. 120).

Defendants' counsel were then permitted to prove by Mrs. Angling, that she lived with M. F. Ball as his

wife from the date of said marriage license up until after the killing of her father, Wm. T. Box, and that they had never been divorced. Counsel for defendants then objected to the witness testifying, because she was the wife of one of the defendants, but their objections were overruled, and said witness was permitted to testify, that she married C. S. Mayfield in Texas in 1881; that she was never divorced from Mayfield; that she was a daughter of deceased; that Mayfield was still living, and that M. F. Ball knew Mayfield and witness when Mayfield and witness lived together as husband and wife, to the introduction of which evidence defendants excepted. (Sup. Rec. 1).

Deceased Box was a citizen of the Chickasaw Nation; his wife was an Indian woman; Filmore Ball's wife was her daughter. (Rec. 47).

M. F. Ball filed a plea to the jurisdiction of the court, (Rec. 11) which was submitted to the jury in the charge of the court. (Rec. 128).

ARGUMENT.

The wife cannot testify against the husband. 1 Greenleaf, 834. When *prima facie* proof is given of the fact that a woman is the wife of a party to a suit, she is incompetent to rebut this proof. Ross vs Niles, Abb. Adm. 411. When the fact of marriage is controverted the wife is incompetent. 2 Stark. Ev., 400; Grigg's Case, 7 Royne, 1; Campbell vs. Twenlow, 1 Price, 81.

An Indian cannot be convicted in the Circuit Court of the United States for killing an Indian. Smith vs. U. S. 151 U. S., 50. The testimony was to an important jurisdictional fact and should not have been admitted.

Assignment of Error:

XIII.

The court erred in refusing to require the Government's officials to deliver the gun introduced in evidence to these defendants, or some other competent person, for the purpose of testing said gun as to the manner in which it shot "low-mould" buckshot, because said gun was the property of J. C. Ball, one of the defendants herein, but had been in the exclusive possession of the Government's officials since shortly after the killing of Wm. T. Box, in 1889. Defendants made said request before they closed their case. It was an admitted fact that deceased, Wm. T. Box, was killed with a shotgun loaded with low-mould buckshot, held by some one at a distance of 8 or 10 feet away; that the shot penetrated his body from his shoulders to his hip; the government witness Blunt testified that the gun in court and the property of J. C. Ball, would "scatter" "low-mould" buckshot badly; defendant J. C. Ball testified that he never shot "low-mould" buckshot from the gun. The fact as to how said gun would shoot "low-mould" buckshot was a material enquiry in this case, and a practical and thorough test of said gun would have accurately settled the disputed question as to whether said

gun fired the shot that killed Wm. T. Box, as claimed by the Government, or whether it did not fire said shot, as contended by these defendants. (Rec. 143.)

Statement:

Joe Cross testified that the wounds on deceased were eight in the breast, one on each side, and three glanced the collar bone. (Rec. 32.)

Blunt testified that he had once owned J.C. Ball's gun, which was now in the possession of the officers of the court, that said gun would scatter buckshot badly, that a a distance of 15 or 20 feet you could hit nothing with it. (Rec. 95.)

Counsel for defendants asked that they have the privilege of testing the shooting qualities of the gun in the presence of a deputy marshal, the gun being the one exhibited in court, and taken from the possession of J. C. Ball, and being the gun that the Government claimed the killing was done with. It was further shown that said gun had been in the exclusive control of the officers of the court since 1889. (Sup. Rec. 2.)

ARGUMENT.

The court had the power to grant the request, and in granting it would have made that certain which was uncertain. The Patent Type Foundry Co. vs. Lloyd, 29 L. J. (Exch.) 207; Thompson's Trials, Sec. 864.

Assignment of Error:

XIV.

The court erred in admitting in evidence against these defendants, and especially against the defendants J. C. Ball and R. E. Boutwell, over the objections of these defendants, the testimony of Mrs. Rider, who testified in substance as follows: "After the killing on the morning of June 27th, 1889, M. F. Ball (Filmore) told me that they were going to arrest him, but that he did not care, as he could prove out of it; that there were two men who staid all night with him by whom he could prove where he was; that they could not prove anything against him, and that they never would dream of John Ball and Bob Boutwell doing such a thing; that they would take him and try him, but as they could not prove anything against him, they would turn him loose. He said he did not see what they were tracking around for; that they could make nothing out of tracks; that he was perfectly satisfied that the tracks would exactly fit J. C. Ball and R. E. Boutwell, but so far as his tracks were concerned, he was not afraid of it; he said he did not see why Joe Cross and Ed. Burney were dishing in so deep, for it was none of their business. He asked me how many shot they took out of old man Box's body. I told him, and then he said that he had shot the other load out of J. C. Ball's gun at some chickens and loaded the gun with fresh shot, and he wanted to know of me if I thought they would still think

J. C. Ball's gun killed deceased. He said they were going to lay it off on an old woman there. He then told me that if he could he would call the old man back this morning as free as he ever done anything in his life. I told him it was too late. He then asked me if I had noticed any one down there eyeing and watching him; I told him I did not, but I did see them. He asked me if he looked bad: I told him he did not; he said that he saw everybody there eyeing him all the time. He told me over a time or two about Burney and Cross tracking around there, and said if it had not been for them tracking around so much that they never would have been bothered." (See Rec. 96.)

And in admitting, over the objection of these defendants, the testimony of J. T. Hoover, who testified in substance as follows: "After the other trial and after M. F. Ball was acquitted, I had a conversation with him about this case. He asked me something about the boys, John Ball and Boutwell. He asked me if I knew anything about them and how they were getting along. I told him no, but that they were in pretty bad shape, I guessed. He said, 'I guess the boys will not hang;' I said, 'I hope not, if they are not guilty.' I told him he ought to do all he could for them, and he said he done about all he could do. I said something about the people thinking that they were all guilty of killing old man Box; he said the people could think and be damned; that so far as he was concerned, he could go up and admit that he killed deceased; that it did not make a damn bit of difference now, as he had come clear and they could not try him for it any

more,' because the same was declarations made by one of the defendants, M. F. Ball, after the homicide was committed, and was not made in the presence or hearing of the defendants J. C. Ball and R. E. Boutwell, or either of them, and the same was calculated to mislead the jury and prejudice them against J. C. Ball and R. E. Boutwell. (Rec· 144).

Defendants J. C. Ball and R. E. Boutwell objected to this evidence and their objection was overruled (Rec. 96), and were granted a general exception to all the rulings of the court (the court having certified the whole record. (Rec. 137.)

ARGUMENT.

Proposition:

After the conspiracy has come to an end, whether by success or failure, the admission of one conspirator, by way of narrative of past facts, are not admissible against the others.

1 Greenleaf Ev., Sec. 111, Logan vs. U. S. 144 U. S. 263.

3 Greenleaf Ev., Sec. 94.

Holden vs. State, 18 Tex. App. 106.

Having admitted this evidence the court should have charged the jury that they could only consider it against M. F. Ball.

Jones' Case 31 Gratt. (Va.) 836.
Collins vs. State 24 (Tex.) App. 141.
Rex vs. Hardy, 24 Howell's St. Tr. 451.

The testimony of these witnesses tended rather to exculpate M. F. Ball in so far as he was charged with being a principal rather than incriminate him, and could have had little effect on the jury in determining M. F. Ball's guilt; but as to J. C. Ball and R. E. Boutwell it was very damaging. Jones' Case, 31 Gratt. (Va.) 836, states the correct doctrine. The court in that case said: "But on a joint trial of two for conspiracy, the declarations of one made after the design was completed and abandoned are admissible, because they tend to connect him with the conspiracy, but the judge should instruct the jury that these declarations have no weight to prove the other guilty of conspiracy." The court failed to instruct the jury in keeping with the principle here announced, hence the admission of said declaration of M. F. Ball was error for which J. C. Ball and R. E. Boutwell ought to have a reversal of this case.

A further consideration is that J. C. Ball and R. E. Boutwell asked a severance among other things on account of this evidence.

Assignment of Error:

XVI.

The court erred in refusing to give to the jury the 3d special charge, asked by the defendant M. F. Ball, which is as follows:

"3d. If you believe from the testimony in this case that the deceased, Wm. T. Box, was a recognized citizen

of the Chickasaw Nation at the time he was killed, and that he had, prior to that time, married a Chickasaw Indian woman under the laws of that tribe of Indians; and if you further believe that he, the said W. T. Box, was residing in said Chickasaw Nation at the time he was so killed; and if you further believe from the testimony that the defendant M. F. Ball, prior to the time said Wm. T. Box was killed, had also married a Chickasaw Indian woman, and was recognized by the Chickasaw government as a member of their tribe by virtue of said marriage with said Indian woman; and if you further believe that he was so recognized at the time Wm. T. Box was killed, and that at that time he, the said M. F. Ball, was residing in the Chickasaw Nation, Indian Territory, then you are charged that this court would not have jurisdiction to try the said M. F. Ball for the offense charged in the indictment herein, and you will find his plea to the jurisdiction of the court to be true." (See Rec. 134.)

And the court erred in his general charge when he charged the jury as follows: "M. F. Ball has filed a plea to the jurisdiction of this court, which states in substance that he was married to the daughter of Wm. T. Box; that Box had married an Indian woman living in the Indian country, and as a result of such marriage was the daughter whom he had married, and that consequently, under the treaty between the Indians and the United States, this court was without jurisdiction to try him. The evidence

offered before you first is the marriage license issued in Cooke county, Texas, which authorizes the marriage of Miss Lucy Box, the lady that Filmore Ball afterward claims to have married, and one Mayfield. Mrs. Mayfield, or Mrs. Ball, testified that she had never been divorced from Mayfield; that she had lived with Mayfield from the time of marriage until a few months prior to her attempted marriage with the defendant, Filmore Ball. The defendant Filmore Ball introduces a marriage license, issued in the Chickasaw Nation, signed by the county judge and filed properly there, and that the evidence attending it shows that the marriage had been performed between him and Mrs. Mayfield. You are instructed that if you believe from the evidence that Wm. T. Box, the man that was killed, was a white man, living in the Chickasaw Nation, and that he married an Indian woman, and as the result of such marriage was the lady that married Mayfield, or Ball, or both, and you believe from the evidence that she was not married to Mayfield, or that if she had been married to him that she was divorced from him, or he was dead at the time of her marriage to Filmore Ball, in that event you are instructed that the court would not have jurisdiction to try Filmore Ball in this case. But if you believe from the testimony that she married Mayfield, and that she was not divorced from him at the time of her attempted marriage to Filmore Ball, or that Mayfield was not dead, or if he was living at the time of the attempted marriage to Filmore

Ball occurred and not divorced from Mayfield, in that event the marriage with Filmore Ball would be a nullity, on account of her disability to contract the marriage relation, and the court would have jurisdiction, and you would find against his plea to the jurisdiction of the court on that ground. (See Rec. 128.)

Because the testimony in the case showed that the deceased, Wm. T. Box, and the defendant M. F. Ball were each members of the Chickasaw tribe of Indians, in the Indian Territory, at the time the homicide was committed, and that they each resided there at the time Wm. T. Box was killed, and because the court in his general charge to the jury submitted to them for their determination the validity of the marriage of Lucy O. Box to C. S. Mayfield, and the marriage of Lucy O. Box or Mayfield to the defendant M. F. Ball, without any proof having been made of the laws of the Chickasaw Nation governing marriages and divorces in said Chickasaw Nation." (Rec. 146).

ARGUMENT.

M. F. Ball and Wm. T. Box having married Chickasaw women and taken up their residences in the Chickasaw Nation, and having been recognized by the Chickasaw Nation as members of that tribe, were Indians, and this court would have no jurisdiction to try the one for the murder of the other. Art. 38 of the Treaty of the United

States and the Choctaw Nation; R. S. of 1873, p. 376; Ex Parte Mayfield, 141 U. S., 107; Ex Parte Reynolds, 5 Dillon, 394; U. S. vs. Osborne, 6 Sawyer, 406.

A marriage under and by virtue of the laws of the Chickasaw Nation, recognition as a citizen by virtue of said marriage, residence in that Nation with an Indian wife, are sufficient to support a plea to the jurisdiction, notwithstanding the fact that it is shown that at one time one of the parties to the marriage contract was not capacitated to make it. Every presumption is in favor of the validity of the marriage. 14 Am. and Eng. Ency of Law, 520, and authorities cited.

Assignment of Error:

XX.

These defendants have not been convicted by the due process of the law of the land in this: The jury that returned the verdict of guilty against the defendants in this case was not placed in charge of a duly sworn bailiff of this court after they were empaneled and charged with this case until they returned a verdict of guilty against these defendants, but, upon the contrary, said jury was in the exclusive control of Drumgoole Williams from the time they were empaneled until they returned their said verdict, without any oath whatever being administered to him, the said Drumgoole Williams, as such special bailiff, all of which will be made apparent by an inspection of the record in this cause, here referred to and made a part hereof. (Rec. 149).

Statement:

Plaintiffs in error asked for a new trial on this ground. (Rec. 22).

It was admitted upon the hearing of said motion, by the Government and each of the defendants, that Drumgoole Williams was in charge of the jury who tried these defendants from the time they were empaneled until they returned a verdict of guilty against these defendants; that the said Drumgoole Williams had no special oath administered to him as bailiff of said jury, and that the only oath ever administered to him was an oath as a deputy United States marshal for the Eastern District of Texas, many months before the trial of this cause commenced. It was further agreed and admitted upon the hearing of said motions for new trial that the court instructed the jury in this case that they must not separate, must not talk to each other, and must not allow themselves to be talked to by any party on the outside about this case. (Rec. 136).

ARGUMENT.

When the jury retire to deliberate on their verdict, they are put in care of an officer to whom an oath is administered. 1 Bishop Crim. Proc., Secs. 991 and 992; People vs. Hughes, 29 Cal., 257.

Assignment of Error:

XXIII.

The court erred in not granting the defendant M. F. Ball a new trial on account of the newly discovered evi-

dence of J. L. Keeler, the marriage license of C. S. Mayfield to Louisa Rodgers, and a certified copy of the record of the divorce proceedings of Louisa Mayfield vs. C. S. Mayfield, had in the district court of Cooke county, Texas, all of which fully appears in the record in this case, here referred to and made a part hereof; because said defendant M. F. Ball had no notice prior to the trial of this cause that the Government would introduce in evidence the marriage license of C. S. Mayfield and Lucy O. Box, the wife of said defendant, and in that way attempt to show that said defendant M. F. Ball was not legally married to Lucy O. Box, alias Mayfield, a Chickasaw Indian woman, and thereby establish the fact that this court had jurisdiction to try said M. F. Ball, and because said newly discovered evidence showed conclusively that M. F. Ball was lawfully married to said Lucy O. Box, alias Mayfield, and the deceased being a member of the Chickasaw tribe of Indians, this court did not have jurisdiction to try the said M. F. Ball for murdering said deceased. (Rec. 150.)

Statement:

In the 25th ground of M. F. Ball's motion for a new trial he asked a new trial on account of the newly discovered evidence mentioned in the assignment, affecting the jurisdiction of the circuit court. (Rec. 23.)

When said motion came on to be heard the following evidence was produced before the court, to-wit:

A certified copy of the marriage license issued by the clerk of Cooke county, Texas, showing that S. C. Mayfield

was married to Louisa Rogers before he married Miss L. O. Box, which said certified copy is hereinbefore set out in full. (Rec. 23.)

The affidavit of J. L. Keller which was attached to M. F. Ball's amended motion for a new trial, to the effect, that he knew Cebe Mayfield, who married Wm. T. Box's daughter, that Cebe Mayfield had married Louisa Rogers before he married Miss Box, that he had a living wife at the time he married Miss Box, that he had never heard of Mayfield getting a divorce from his first wife, that he heard she was living in San Antonio, Texas. (Rec. 26.)

A certified copy of the record of the district court of Cooke county, Texas, showing that Louisa Mayfield instituted in said district court of Cook county, Texas, on the day of January, A. D. 1878, a suit for a divorce against S. C. Mayfield, and that said suit remained on the docket of said district court of said county up to the 12th day of February, A. D. 1883, when the said suit was dismissed for the want of prosecution. (Rec. 136.)

On the trial of the cause a marriage license showing that C. S. Mayfield married Miss L. O. Box on Sept. 4, 1881, was introduced. (Rec. 119.)

Mrs. Angling (alias Mayfield) testified that Mayfield was living and she had not been divorced from him when she married M. F. Ball. (Sup. Rec. 1.)

Plaintiff in error M. F. Ball, in support of his plea to the jurisdiction offered on the trial, a ceftificate of marriage showing that M. F. Ball married Mrs. L. O. May-

field August 31, 1886. (Rec. 12[9].)

Wm. T. Box was a citizen of the Chickasaw Nation. (Rec. 47.)

ARGUMENT.

The alleged newly discovered evidence stands on much higher ground than being newly discovered evidence merely, it consisted of jurisdictional facts.

"This court has power to enquire with regard to the jurisdiction of the inferior court, either in respect to the subject matter, or to the person, even if such enquiry involved an examination of facts outside of, but not inconsistent with the record." Ex Parte Mayfield, 145 U. S. 107.

When the deceased and the person accused of the murder are both members of the tribe of Chickasaw Indians, the United States courts have no jurisdiction over the offense. Smith vs. U. S., 151 U. S., 50; Ex Parte Mayfield, *supra*.

The undisputed evidence offered by the government upon the trial showed that the deceased Box was a Chickasaw Indian citizen by adoption, he having married an Indian woman and lived in the Indian Territory for many years with her as his wife. Plaintiff in error, M. F. Ball, proved on the trial that he married a daughter of deceased Box. The government, without any notice to M. F. Ball, proved by certified copy of marriage license that Miss Lucy Box, now M. F. Ball's wife, was married to one

Mayfield before she married Ball, and that she had not been divorced at the time she married M. F. Ball. This proof, under the charge of the court forced the jury to find against M. F. Ball's plea to the jurisdiction. (See Rec. 129). After the conviction, plaintiff in error, M. F. Ball, discovered the real fact to be at the time Mayfield married Miss Lucy Box, he, Mayfield, had a living wife and a divorce suit then pending in Cooke county, Texas. This undisputed proof showed the marriage between Mayfield and Miss Box to be a nulity, and hence Mrs. Mayfield could marry M. F. Ball at the time she did, the marriage was valid and constituted Ball a citizen of the Chickasaw Nation, and the court had no jurisdiction to try M. F. Ball for the murder of Box, and should have granted a new trial as to M F. Ball and discharged him.

Assignment of Error:

XXV.

The court erred in overruling the seventeenth (17) ground in the motion for a new trial made by the defendant M. F. Ball, which is as follows, to-wit: "Because the verdict of the jury finding this defendant guilty of the murder of Wm. T. Box is contrary to the law as given in charge by the court, is contrary to the evidence adduced, and is without evidence to support it in this: the testimony conclusively shows that if this defendant is guilty of any offense, he is guilty as an accessory and not as a principal offender in the killing of Wm. T. Box." (Rec. 151).

Assignment of Error:

XXVI

The defendant M. F. Ball has not been tried by due process of the law of the land in this: He was indicted, tried, convicted and sentenced to death upon an indictment charging him, the said M. F. Ball, with being a principal offender in the killing and murdering of Wm. T. Box, when all of the evidence, which is made a part of the record in this case, here referred to and made a part hereof, shows conclusively that the said M. F. Ball was not present when the said Box was killed; that he, the said M. F. Ball, was doing no act at the time said Box was killed in furtherance of a common design of these defendants or any one else to kill deceased; but the testimony shows conclusively that the said M. F. Ball, at the very time the shot was fired that killed deceased, was at a house a half mile away playing a fiddle for parties at a dance, and said testimony shows that the said defendant M. F. Ball was not a principal offender in the killing of said Box, but if guilty of any offense he was guilty as an accessory to said killing. (Rec. 151).

Statement:

The undisputed evidence shows that M. F. Ball was at R. E. Boutwell's house playing the fiddle at the time of the homicide. (Rec. 59).

On the night of June 25, 1889, there was a dance at R. E. Boutwell's house; Wm. T. Box was there. (Rec.

58). Box left for home and after he left J. C. Ball and R. E. Boutwell left. (Rec. 63). The next morning Box was found dead and the wounds on his body indicated that he had been shot with a shotgun, loaded with buckshot. (Rec. 32). The evidence indicates that J. C. Ball and R. E. Boutwell shot Box. Boutwell's house was about 1000 yards from where Box was killed; (Rec. 35) that at the time the report of the gun was heard M. F. Ball was playing the fiddle for a set that was then dancing. (Rec. 88.) After this set was over M. F. Ball tried to get those who were preparing to leave for home to stay longer. (Rec. 89).

It was the intention of the Solicitor General and counsel for plaintiffs in error to have incorporated in the printed record all the evidence that tended to connect M. F. Ball with the murder of Box.

ARGUMENT.

M. F. Ball was charged and convicted as a principal to the murder of Box; the evidence shows him to be an accessory, if anything, and the conviction cannot stand. Hughes vs. State, 12 Ala., 458; 1 Bishop's Crim. Law, Secs. 653 and 663; Howly vs. State, 15 Ga., 346.

The contention of the prosecution is that J. C. Ball and R. E. Boutwell were the real actors in the killing, and that M. F. Ball was an abettor of the murder or a princi-

pal in the second degree, and that he was constructively present. The court submitted this theory to the jury. (Rec. 130).

"If the will of such other individual contributed to the act, the test, to determine whether the law deems him a principal rather than an accessory, is, whether he was so near, or otherwise so situated as to make his personal help, if required, to any degree available." 1 Bishop's Crim. Law, Sec. 653; see Chitty's Crim. Law, 256; Com. vs. Knapp, 9 Pick., 496.

Tested by this rule, the undisputed evidence makes M. F. Ball an accessory and not a principal. M. F. Ball was not actually present at the scene of the killing, and was not so situated as to render any personal aid to those engaged in the killing, and hence was not constructively present. Whatever complicity M. F. Ball may have had in the killing of Box, the proof wholly fails to show him to be a principal, and this conviction cannot stand.

If for any cause this case is reversed as to M. F. Ball, we contend that it ought to be reversed as to J. C. Ball and R. E. Boutwell also. If M. F. Ball's plea of *autre fois acquit* was good, J. C. Ball and R. E. Boutwell were entitled to the benefit of his testimony, free from the encumbrance of this charge. If this court had no jurisdiction to try M. F. Ball, then certainly to place him on trial with J. C. Ball and R. E. Boutwell, and admit in evidence his declarations made after the culmination of the conspiracy, which were damaging to J. C. Ball and R. E.

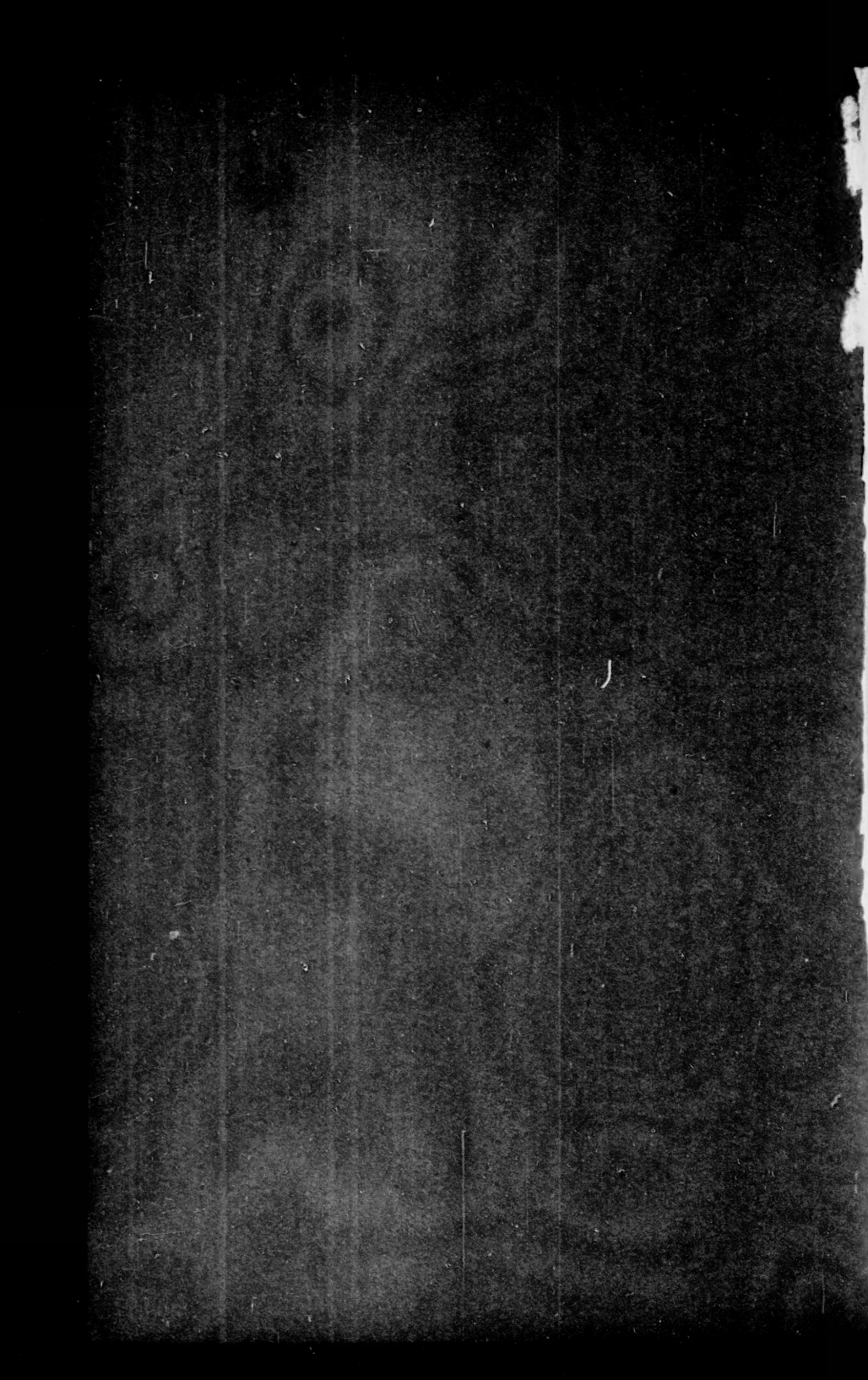
Boutwell in character, and which were in no way limited by the court in his charge to the jury, was detrimental to J. C. Ball and R. E. Boutwell, and constituted an injury to their substantial rights.

We submit that for the errors complained of, this case ought to be reversed.

J. C. HODGES,

And C. H. SMITH,

Att'ys for Plaintiffs in Error.



In the Supreme Court of the United States.

OCTOBER TERM, 1895.

M. F. BALL, JOHN C. BALL, AND R. E. Boutwell, plaintiffs in error,
v.
THE UNITED STATES.

No. 461.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF FOR THE UNITED STATES.

POINTS AND ARGUMENT.

For the convenience of the court the assignments of error will be treated in the order in which they are presented in the brief for plaintiffs in error.

FORMER JEOPARDY — ASSIGNMENTS III, IV, XV, AND XVII.

The third assignment is as follows:

The court erred in sustaining the motion made by the district attorney to strike out the special plea

of former jeopardy and former acquittal of the defendant M. F. Ball, filed herein on the 25th day of April, A. D. 1894, which said special plea and motion to strike out the same are made parts of the record herein, here referred to and made a part hereof, because said special plea showed that the said defendant M. F. Ball had, before the indictment in this case had been presented in this court, been legally tried by a jury duly and legally empanneled in a court of competent jurisdiction, to wit, in the circuit court of the United States in and for the eastern district of Texas, at Paris, Texas, for the same offense charged against him in this cause, to wit, for the shooting, wounding, killing, and murdering of Wm. T. Box, and by said jury found not guilty of said offense, and by said court discharged by its judgment entered of record. (Rec., p. 140.)

The special plea of M. F. Ball was as follows:

And now comes M. F. Ball, one of the defendants in the above cause, and for special plea herein says:

First. That heretofore, on or about the 30th day of November, A. D. 1889, he was tried and acquitted at Paris, Texas, in a court of competent jurisdiction, to wit, in the circuit court of the United States for the eastern district of Texas, upon an indictment numbered 3 in said court, duly and legally presented therein, charging this defendant jointly with J. C. Ball and R. E. Boutwell, with the same identical offense that is charged in indictment No. 230 herein, and upon which he is now called to answer; that indictment No. 3 aforesaid charged this defendant and his codefendants with the same identical overt acts, i. e., shooting William T. Box, that they are now charged with in indictment No. 230 herein.

Second. That he was duly arraigned and pleaded not guilty to the charge in the said indictment No.

3; that thereupon he was tried before a jury of twelve men, duly and legally selected, empanneled, and sworn to try the issue so joined, in the United States circuit court for the eastern district of Texas, holding session at Paris, Texas, and being the court wherein said indictment was duly and legally presented by a grand jury duly organized by said court.

Third. That on the 3d day of November, A. D. 1889, the jury so selected, empaneled, and sworn, after hearing the evidence and the charge of the court, returned into court the following verdict, to wit: "We, the jury, find the defendants J. C. Ball and R. E. Boutwell guilty, as charged in this indictment, and we find M. Filmore Ball not guilty. A. P. Ball, foreman. Nov. 3rd, 1889." The court received and filed said verdict, and then and there rendered its judgment, as follows: "It is therefore ordered by the court that the defendants J. C. Ball and R. E. Boutwell are guilty as charged in the indictment herein and as found by the jury, and it is ordered that they be remanded to the custody of the marshal, and be by him committed to the county jail of Lamar County to await the judgment and sentence of the court. It is further ordered that the defendant M. F. Ball be discharged and go hence without day." All of which proceedings appear upon the record of said United States circuit court in and for the said eastern district of Texas, holding sessions at Paris, Texas, certified copies of said entries are hereto attached, marked "Exhibit A," and made a part hereof, which said judgment was never vacated, annulled, or set aside in any way.

Fourth. Defendant shows to the court that said indictment No. 3 aforesaid was a good and valid indictment, and charged this defendant with the

commission of a felony, and in so charging charged this defendant with the same overt acts, to wit, the shooting of William T. Box, that are charged in the indictment No. 230, to which affiant now pleads.

Wherefore affiant pleads former jeopardy and former acquittal upon the same identical offense charged in the indictment in this cause.

Fifth. Defendant says that if he is mistaken as to the bill of indictment No. 3 as aforesaid, charging him and his codefendants with the same offense charged in indictment No. 230, and the court should hold that indictment No. 3 only charged this defendant and his codefendants with assault with intent to kill William T. Box, then this defendant for special plea in this behalf shows to the court that the shooting and wounding William T. Box, charged in said indictment No. 3, is the same identical shooting that is charged in indictment No. 230, and is one and the same transaction; and that the said William T. Box died before the filing of the indictment No. 3 against the defendant and his codefendants, and which fact was known to the dist. atty. who drew the bill of indictment, and to the grand jury that presented said indictment No. 3, and that by the terms of said indictment this defendant was charged with assault with the intent to kill said William T. Box, and was tried in said court and acquitted of said offense of assault to kill, and all other offenses charged in said indictment. This defendant therefore charges that the United States, by its legally constituted grand jury, district attorney, and circuit court, as aforesaid, in the manner aforesaid, and without the consent of this defendant, carved out of the shooting of William T. Box the offense of an assault to kill, and tried this defendant, of which said offense he was duly and legally acquitted.

Wherefore he pleads said acquittal in bar of any further prosecution for the alleged shooting of William T. Box, as charged in said two indictments. (Rec., pp. 3, 4, 5.)

The fifteenth assignment is as follows:

Because the court erred in failing and refusing to give to the jury the special charges, No. 1 and 2, asked by the defendant M. F. Ball, and which said special charges are as follows:

1. If you believe from the evidence in this case that the defendant M. F. Ball is the same M. F. Ball named in indictment No. 3, introduced in evidence herein, and that a jury duly selected, empannelled, and sworn to try him upon said indictment returned a verdict of not guilty against said M. F. Ball, and if you further believe from the testimony in this case that the said M. F. Ball was charged in said indictment No. 3 with the same transaction and offense as charged in the indictment in this case, i. e., if you believe that he, the said M. F. Ball, was charged in said indictment No. 3 with the shooting, wounding, killing, and murdering of Wm. T. Box in Pickens County, Chickasaw Nation, Indian Territory, and if you further believe that Wm. T. Box was dead at the time said indictment No. 3 was returned against said M. F. Ball, and that that fact was known to the Government's prosecuting officer who drew said bill of indictment No. 3 at the time he so drew the same, then you are charged that the said M. F. Ball has been once placed in jeopardy for the shooting, wounding, assaulting, killing, and murdering of Wm. T. Box, and you will find the defendant's, M. F. Ball's, plea of former acquittal to be true and find him not guilty upon the indictment herein.

"2nd. You are instructed that under the evidence and admissions in this case the defendant M. F. Ball has been heretofore tried and acquitted of the killing and murdering of Wm. T. Box and by a valid judgment of this court discharged of said offense, which said judgment has been in no way set aside, annulled, or otherwise vacated or appealed from; you will therefore find the said M. F. Ball's plea of former acquittal and former jeopardy to be true and acquit him herein."

And the court erred in his general charge, wherein he charged the jury in this case as follows, to wit:

"The defendant Filmore Ball has further pleaded that he has been tried heretofore in this court on an indictment charging him with the murder of Box, and was acquitted. The facts are admitted that he was so tried, and he pleads former acquittal in bar of this prosecution. Upon that plea you are instructed that the Supreme Court of the United States has decided that the indictment was defective in so far as it attempted to charge the offense of murder, and the defendant's plea of former acquittal would not be good, and you would find against him. In other words, parties indicted upon a defective indictment could not plead a former conviction or acquittal, and you are instructed to find against that plea."

Because it was admitted upon the trial of this cause that the offense charged in indictment No. 3, returned into the circuit court of the United States in and for the eastern district of Texas, at Paris, Texas, on the 17th day of October, A. D. 1889, by a grand jury duly empannelled in said court, which said indictment is made a part of the record, in this cause and here referred to, and indictment No. 230, returned into said court on the 7th day of May, A. D. 1891, and upon which these defendants have been tried and convicted in this case, is for one and

the same transaction and offense—that is to say, for the killing and murdering of Wm. T. Box by the defendants herein, M. F. Ball, J. C. Ball, and R. E. Boutwell, and that the said M. F. Ball, J. C. Ball, and R. E. Boutwell, named in said indictment No. 3, are the same M. F. Ball, J. C. Ball, and R. E. Boutwell named in indictment herein, No. 230, and not other and different parties; and the uncontroverted evidence in the case, which was admitted without objection from the Government, showed conclusively that the defendant M. F. Ball was tried in this court upon said indictment No. 3 and acquitted of said offense prior to the time indictment No. 230 herein was returned against him, and he, said M. F. Ball, placed once in jeopardy of life and liberty and acquitted of said offense in a court of competent jurisdiction and by a judgment of said court, made and entered, discharged. (Rec., pp. 145, 146.)

The fourth assignment is as follows:

The court erred in sustaining the motion made by the district attorney to strike out the special plea of former jeopardy and former conviction of the defendants J. C. Ball and R. E. Boutwell, filed herein on the 25th day of April, A. D. 1894, which said special plea and motion are made parts of the records in this case, here referred to, and made a part hereof, because said special plea of said defendants showed that the matters charged in indictment No. 3, presented to the circuit court of the United States, eastern district of Texas, and the matters charged in the indictment in this case are for one and the same transaction and offense, to wit: For the shooting, assaulting, killing, and murdering Wm. T. Box; that at the time said indictment No. 3 was presented against said defendants in said court the

Government's prosecuting officer and the grand jury that returned the same knew that Wm. T. Box was dead; that the Government through its duly constituted grand jury and prosecuting officer had and did by the finding and presenting of said indictment No. 3 in said circuit court in and for the eastern district of Texas (which said indictment No. 3 is a part of the record in this case, here referred to, and made a part hereof) against the said defendants J. C. Ball and R. E. Boutwell, carved out of the shooting, assaulting, killing, and murdering of said Wm. T. Box a lesser offense than that of murder—that is to say, the Government, through its said grand jury and prosecuting officer, carved out of said shooting, assaulting, killing, and murdering of Wm. T. Box, by the presentation of said indictment No. 3 in said court, the offense of an assault to kill and murder the said Box, and upon said indictment No. 3 the said defendants J. C. Ball and R. E. Boutwell were placed upon trial in said circuit court before a jury duly selected, empannelled, and sworn, and a verdict of guilty of said offense returned against them by said jury, upon which a judgment of said court was pronounced and entered against them, adjudging them, the said J. C. Ball and R. E. Boutwell, guilty of said offense, and said defendants thereby placed once in jeopardy and the Government thereby barred from prosecuting them for the crime of murder. (Rec., pp. 140, 141.)

The special plea of J. C. Ball and R. E. Boutwell is as follows:

And now come the defendants J. C. Ball and R. E. Boutwell herein, and for special plea herein they say:

First. That on the 17th day of October, A. D. 1889, the grand jury for the United States of Amer-

ica, empaneled in the circuit court for the eastern district of Texas, holding sessions at Paris, Texas, returned and presented in said court a bill of indictment, numbered 3, against these defendants and M. F. Ball, charging them jointly with the same overt acts that are charged in the indictment numbered 230 that defendants are now called to answer; a certified copy of said indictment No. 3 is hereto attached, marked "Exhibit A" for identification, and made a part hereof; that the facts and acts charged in said indictment No. 3 were and are the same identical acts and transaction charged in the indictment No. 230 herein.

Second. On the 30th day of October, A. D. 1889, these defendants and their codefendant, M. F. Ball, were arraigned and placed on trial in said circuit court of the eastern district of Texas, upon all the charges and offenses charged in said indictment No. 3, as will appear from a certified copy from the record of said court hereto attached, marked "Exhibit B" for identification, and made a part hereof.

Third. On the 3d day of November, A. D. 1889, the jury empanneled in said court in said cause returned into court a verdict in words and figures as follows, viz: "We, the jury, find the defendants J. C. Ball and R. E. Boutwell guilty as charged in the indictment, and we find M. Filmore Ball not guilty. Nov. 3rd, 1889. A. P. Ball, foreman."

Fourth. Said verdict was received in said cause without any objection from either of the defendants and by the court ordered filed and the jury discharged. Upon the return of said verdict the court then and there entered its judgment in words and figures as follows, to wit: "It is therefore considered by the court that the defendants J. C. Ball and R. E. Boutwell are guilty as charged in the in-

dictment herein and as found by the jury, and it is ordered that they be remanded to the custody of the marshal and be by him committed to the county jail of Lamar County to await the judgment and sentence of the court. It is further ordered that the defendant M. F. Ball be discharged and go hence without day." All of which is apparent from the record in said cause, certified copies of which are hereto attached, marked "Exhibit C," and made a part hereof.

Fifth. Defendants allege that they were, by virtue of said verdict and judgment or order remanding said defendants to jail to await the judgment and sentence of the court, held in Lamar County jail until the present indictment, No. 230, was presented and filed against these defendants and their codefendant, M. F. Ball, after which time said case, No. 3, was dismissed without the knowledge or consent of these defendants, and they were then required to give bond to answer the charge in said indictment No. 230.

6th. Defendants show to the court that said indictment No. 3, aforesaid, charged these defendants and their codefendant with unlawfully and with malice aforethought shooting and wounding William T. Box; that said indictment was a good and sufficient indictment, fully charging them, and each of them, with the offenses of assault with intent to kill; that the shooting and wounding of William T. Box charged in said indictment No. 3 is the same identical shooting and wounding of William T. Box as charged in indictment No. 230 that they are now called upon to answer, and is one and the same shooting, and one and the same time, place, and transaction. That if said William T. Box ever died from gunshot wounds as charged in said indictment No.

230, that he died before the said indictment No. 3 aforesaid was presented, which fact was known to the district attorney who drew the bill of indictment and to the grand jury that presented same before the same was presented; that the facts proved upon the trial of these defendants upon indictment No. 3 showed that Box was dead at the time they were tried on said indictment charging them with an assault with intent to kill William T. Box, by reason of which presentation of said indictment No. 3 and the empanneling and swearing the jury and arraigning these defendants for trial aforesaid defendants say they were put in jeopardy for the same offense which they are now called to answer; that since the death of the said William T. Box the Government, by its legally constituted grand jury and circuit court aforesaid, and without the consent of either of these defendants, carved out of the shooting and wounding of William T. Box the offense of an assault with intent to kill, and tried and convicted these defendants, from which said conviction for and assault with intent to kill these defendants have never appealed; that if the court trying these defendants failed to render judgment upon the verdict of the jury finding these defendants guilty of an assault with intent to kill as charged in indictment No. 3, it is no fault of these defendants; that they, nor either of them, has ever objected to a legal judgment being rendered upon said verdict finding defendants guilty as charged in said indictment No. 3.

All the objections the defendants ever made to the judgment of the court trying them was to the judgment sentencing them to death, which said judgment was not supported by the indictment and verdict of the jury; that there is no order or judgment of this court vacating and setting aside said

verdict unless the same was vacated and rendered void by the action of this court in dismissing said case No. 3, aforesaid.

Wherefore these defendants plead specially said facts in bar of further prosecution for the alleged shooting and wounding William T. Box, and pray that they be discharged and go hence without day. (Rec., pp. 6–8.)

The exceptions to the special plea and motion were as follows:

Now comes the United States of America, by and through Robert E. Hannay, the United States attorney in and for the eastern district of Texas, and excepts to the special plea of the defendants filed herein, and moves the court to strike out and hold the same for naught for the following reasons, to wit:

First. Because the said special plea does not set forth the bill of indictment number 3 referred to therein, and does not set forth the records or any part thereof of the proceedings before the said court based upon said bill of indictment, and does not set forth the motion in arrest of judgment and other records filed in the said cause, and does not set forth the judgment of the Supreme Court, in which said indictment is held valid for assault only, and in which said cause was remanded for further proceedings in the said circuit court.

Second. Because the said special plea should be made to speak the truth concerning all the proceedings which have been had in the said circuit and the said Supreme courts in the above styled and numbered cause.

Third. Because the said defendants and none of them have been tried in the said circuit court upon a valid indictment for the murder of William T.

Box. That the bill of indictment number 3, referred to in the said special plea of the defendants, and upon which the defendants were put to trial, was insufficient in law, and was void, and was in form and substance so defective that no valid judgment could have been entered of record in any cause or proceeding based upon said bill of indictment.

Fourth. Because none of the said defendants have been in legal jeopardy by virtue of any proceeding based upon said void, defective, and insufficient indictment, and the said defendants and none of them have been legally tried for the crime of murder, as set out in the indictment filed herein and numbered 230.

Fifth. Because whatever acquittal or conviction there may have been in the said former proceeding was void and should go for naught; and further, because no penalty had been inflicted or attempted to have been inflicted upon the said defendants, or either of them, upon any judgment or order of the said circuit court based upon said void proceeding; and further, because no punishment or penalty could have been legally inflicted upon said defendants, or either of them, upon any such order or judgment. (Rec., pp. 10, 11.)

The court overruled the pleas. (Rec., p. 11.)

The seventeenth assignment is as follows:

The court erred in refusing to give to the jury the special charge No. 4 asked by the defendants J. C. Ball and R. E. Boutwell, which said special charge is as follows:

"4th. If you believe from the testimony in this case that the defendants J. C. Ball and R. E. Boutwell are the same identical J. C. Ball and R. E. Boutwell charged in indictment No. 3 introduced in

evidence herein, and if you further believe that said indictment No. 3 charged the said J. C. Ball and R. E. Boutwell with the same transaction and offense as the indictment herein charges them with, i. e., the shooting, wounding, assaulting, killing, and murdering of Wm. T. Box in the Chickasaw Nation, Indian Territory, and if you further believe from the testimony that at the time said indictment No. 3 was returned against said defendants that the grand jury that returned the same and the Government's officer who drew said indictment No. 3 knew that Wm. T. Box was dead at the time they so drew said indictment, and that he died from the infliction of the gunshot wound charged to have been inflicted by these defendants, and if you further believe that said defendants were arraigned, tried, and convicted upon said indictment No. 3 by a jury duly selected, empanneled, and sworn, then I charge you that the defendants J. C. Ball and R. E. Boutwell were each charged in said indictment No. 3 with an assault to kill and murder the said Wm. T. Box, and that the Government of the U. S., through its officers aforesaid, by presenting in this court said indictment No. 3, carved out of the shooting and wounding, killing, and murdering of Wm. T. Box a lesser offense than murder, to wit, assault to commit murder, and by the empanneling and swearing the jury to try said defendants upon said indictment, and in requiring said defendants to plead thereto, the Government has waived its rights to prosecute said defendants for the crime of murder, and is now estopped from claiming a conviction in this case for any offense higher than an assault to murder, and you will therefore find the special plea of said defendants, pleading former jeopardy and former conviction, to be true."

And the court erred in his general charge to the jury, wherein he charged them as follows: "The

defendants J. C. Ball and R. E. Boutwell have filed a plea that they were tried in this court under an indictment that was good for an assault with intent to kill and were found guilty of this offense, and consequently the court no longer has jurisdiction to try them for murder, because they say they have been convicted of a lower degree, and therefore can not be again convicted for murder. You will find against that plea, for the reason the Supreme Court held the indictment bad for murder and do not say that it charged an assault to murder, and you are instructed to find against that plea."

Because it was admitted upon the trial of this cause that the offense charged in indictment No. 3 returned into the circuit court of the United States in and for the eastern district of Texas on the 17th day of October, A. D. 1889, by a grand jury duly empaneled in said court, which said indictment is made a part of the record in this cause, and here referred to and made a part hereof, and indictment No. 230, returned into said court on the 7th day of May, A. D. 1891, and upon which these defendants have been tried and convicted in this case, is for one and the same transaction and offense, that is to say, for the killing and murdering of Wm. T. Box by the defendants herein; that the M. F. Ball, J. C. Ball, and R. E. Boutwell named in the indictment No. 3 are the same M. F. Ball, J. C. Ball, and R. E. Boutwell named in the indictment herein, No. 230, and are not other and different persons, and the uncontroverted evidence in this case, which was admitted without any objection being made thereto, shows that the defendants J. C. Ball and R. E. Boutwell were tried upon said indictment No. 3 in the circuit court of the United States in and for the eastern district of Texas, at Paris, Texas, and convicted of the offense

> therein charged, prior to the time indictment No. 230 herein was returned into said court; that the Government's officer who drew said indictment No. 3 knew at the time he drew the same, and the grand jury was aware at the time they returned the same into this court, that the said Wm. T. Box was dead at that time, and that he died from the infliction of the gunshot wounds charged to have been inflicted upon him by these defendants; that said indictment No. 3 charged these defendants with an assault to kill the said Wm. T. Box, and the Government, by the presenting of said indictment No. 3, carved out of the offense of shooting, wounding, assaulting, killing, and murdering of said Box the lesser offense of assault to kill and murder, and was thereby estopped from presenting against these defendants indictment No. 230 herein, charging them with the higher crime, to wit, murder. (Rec., pp. 147, 148.)

Assignments III and XV, which cover the defense of *autrefois acquit* of M. F. Ball, are discussed together on pages 4 to 25 of the brief. Assignments IV and XVII, which cover the defense of *autrefois convict* of J. C. Ball and R. E. Boutwell, are discussed together on pages 25 to 37 of the brief.

W. T. Box was killed on June 26, 1889. (Rec., pp. 32, 49, 50.)

The indictment upon which the pleas of former jeopardy are based was found October 17, 1889, which was within a year and a day from the infliction of the injuries.

The two indictments are identical, with the exception that the indictment in this case has the sentence in the original indictment concluding with the words "did languish, and languishing did die" amended so as to read,

"and languishing did *then and there instantly die, and did then and there within a year and a day after the infliction of the said mortal wound as aforesaid.*" (Compare indictments, Rec., pp. 2 and 8.)

The third, fourth, and fifth grounds of the exceptions to the pleas raise the issue whether or not the defendants were ever in jeopardy under the first indictment.

The requests above set out and which were refused, and the portions of the charge which were excepted to, raise the same question.

If they were in jeopardy then the court erred and there must be a reversal as to all of the defendants.

The defenses set up the same facts and are in substance the same, except that M. F. Ball pleads *autrefois acquit* and the others *autrefois convict*.

Therefore, the third, fourth, fifteenth, and seventeenth assignments will be treated together.

This court held, on writ of error sued out in the former case by Boutwell and J. C. Ball, that the indictment for murder was fatally defective, reversed the judgments, and remanded the cause "*with a direction to quash the indictment and for such further proceedings in relation to the defendants as to justice may appertain.*" (*Ball* v. *United States*, 140 U. S., 118, 136.)

In the opinion the court said:

> And while it may be conceded that as this indictment was found on the 17th of October, 1889, and the day of the assault is fixed as on the 26th of June of that year, and it is asserted that Box died, the failure to aver the time of death is not fatal, we hold that the omission to state the place is so. By

> section 1035 Rev. Stat. a party may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged. The verdict found the defendants guilty as charged, and the order of November 15 used no other language. Defendants were well charged with assault, but not with murder, and the verdict must be held to have related only to that which was well charged, upon which no such judgment as that before us can be sustained (p. 136).

On that opinion the argument for plaintiffs in error is based.

It is said that the court has held that the indictment, while it did not charge murder, well charged an assault; that the verdict related to what was well charged; that by section 1035 of the Revised Statutes a party may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged. (Brief, pp. 18, 19.)

It is next said that "by reason of the provisions of section 1035, R. S., an assault with intent to kill is included in every indictment for murder, and that offense is included in indictment No. 3." (Brief, p. 19.)

It is next said that the indictment, if it well charged an assault, as the court said, necessarily well charged "an assault with intent to commit murder," for it included every ingredient requisite to charge murder except time and place, and that "the malice aforethought" charged involved "unlawful intent." (Brief, pp. 18, 19.)

In conclusion, it is said that M. F. Ball was acquitted and the others were convicted of the felonious charge of assault with intent to commit murder and that this constitutes a plea in bar of this indictment. (Brief, pp. 18, 19, 25, 36.) In short, as to Boutwell and J. C. Ball, it is said that the court, after holding that they were well charged with an assault, and that under section 1035 a party indicted for an offense may be convicted of an attempt to commit the offense charged, and that the verdict related to what was well charged, committed the error of remanding the cause and directing the indictment to be quashed and the prisoners to be turned loose in a way that they could not be tried under a new indictment, instead of ordering them to be sentenced upon the verdict of guilty of assault with the intent to commit murder.

If plaintiffs in error were well charged with assault with intent to commit murder, and could have been convicted *under the fact's proven*, then the pleas are a good defense.

The acquittal of M. F. Ball would bar a further prosecution of him, and the other two, though twice found guilty, would go scot-free because *no proper judgment was entered on the former verdict*.

It is confidently insisted for the Government that no such result has been reached, and that there is a misunderstanding of the opinion referred to.

The court did not hold that an indictment for murder, fatally defective in charging murder, would sustain a conviction of "an attempt to commit murder."

There is a wide difference between saying that "a party may be found guilty of any offense, the commission of which is necessarily included in that with which *he is charged* in the indictment, or may be found guilty of an attempt to commit the offense so *charged*," and saying that "a party may be found guilty of any offense, the commission of which is necessarily included in that with which he was *sought to be, but was not effectually, charged* in the indictment, or may be found guilty of an attempt to commit the offense so sought to be charged."

Necessarily included, does not mean, arising out of the same facts, but, embraced as a crime within that charged. Murder, as will be hereafter shown, only included manslaughter. This is murder as known at the common law, and it does not embrace assaults of any kind which were only misdemeanors.

Besides, section 1035 only applies where "such attempt be itself a separate offense." There is no United States statute making an "attempt to murder" a separate offense.

The common law, which made it a separate offense and a *misdemeanor*, is no part of the criminal law of the United States. The proviso of section 1035 limits it to such sections as 5415, Revised Statutes, where the "attempt" is made a crime.

The evidence on indictment No. 3 showed that Box was killed when the assault was made. Defendants, therefore, could not have been found guilty of an attempt to commit murder upon evidence showing that murder had actually been committed. There could be no attempt to commit a crime which had been consummated, for the

attempt, under such facts, would be merely a step which would be merged in the perfected crime.

In the *Sparf Case* (156 U. S., 63) this court said:

> The court below assumed, and correctly, that section 1035 of the Revised Statutes did not authorize a jury in a criminal case to find the defendant guilty of a less offense than the one charged, unless the evidence justified them in so doing.
>
> Congress did not intend to invest juries in criminal cases with power arbitrarily to disregard the evidence and the principles of law applicable to the case on trial. The only object of that section was to enable the jury, in case the defendant was not shown to be guilty of the particular crime charged, *and if the evidence permitted them to do so*, to find him guilty of a lesser offense necessarily included in the one charged, or of the offense of attempting to commit the one charged. Upon a careful scrutiny of the evidence, we can not find any ground whatever upon which the jury could properly have reached the conclusion that the defendant Hansen was only guilty of an offense included in the one charged, or of a mere attempt to commit the offense charged. A verdict of guilty of an offense less than the one charged would have been in flagrant disregard of all the proof, and in violation by the jury of their obligation to render a true verdict. There was an entire absence of evidence upon which to rest a verdict of guilty of manslaughter or of simple assault. A verdict of that kind would have been the exercise by the jury of the power to commute the punishment for an offense actually committed, and thus impose a punishment different from that prescribed by law.

Furthermore the court did not hold that J. C. Ball and Boutwell were convicted, or could have been convicted of assault upon the indictment and the evidence.

While it was said that defendants were well charged with assault, and that the verdict could only be held to have related to what was well charged, *the action of the court in ordering the indictment to be quashed, and in not remanding for a sentence in accordance with such a verdict upon such an indictment, shows conclusively that it was not held that upon a defective indictment for murder, where the evidence showed that death took place before the indictment was found there was a conviction of an assault with intent to murder, or that there could be a conviction of an assault.*

LAW IN FORCE IN INDIAN TERRITORY.

Section 2145 of the Revised Statutes provides as follows:

> Except as to crimes, the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

Section 2142 of the Revised Statutes provides as follows:

> Every white person who shall make an assault upon an Indian or other person, and every Indian who shall make an assault upon a white person within the Indian country, with a gun, rifle, sword, pistol, knife, or any other deadly weapon, with intent to kill or maim the person so assaulted, shall be punishable by imprisonment, at hard labor, for not more than five years nor less than one year.

On this statute the argument for plaintiffs in error is largely founded. (Brief, pp. 17, 18, 21.)

Section 2142 was superseded by section 25 of the *Act of March 1, 1889* (1 Supplement to the Revised Statutes, 675), which is as follows:

> That if any person in the Indian country assault another with a deadly weapon, instrument, or other thing with an intent to inflict upon the person of another a bodily injury, where no considerable provocation appears or where the circumstances of the assault show an abandoned and malignant disposition, he shall be adjudged guilty of a misdemeanor, and on conviction shall be fined in any sum not less than fifty nor exceeding one thousand dollars and imprisoned not exceeding one year.

Section 28 provides "that all laws and parts of laws inconsistent with the provisions of this act be and the same are hereby repealed."

Section 2142 of the Revised Statutes, and section 25 of the act of March 1, 1889, can not stand together, for the same facts which would justify a conviction under 2142 would justify a conviction under 25. A person could not be guilty of two crimes denounced by separate statutes upon the same state of facts.

If these defendants could have been guilty at all under the first indictment, it would have been necessary to find them guilty under section 25; for it is a well settled rule that where, upon the same state of facts, two crimes are defined, that which is the mildest will prevail, and this is especially true when it arises from a subsequent enactment, as in this case.

This act went into effect before the crime charged in this case was committed, which was on June 26, 1889.

The law applicable to the crime of murder is set forth in section 5339 of the Revised Statutes, as follows:

> Every person who commits murder—
> First. Within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States * * * shall suffer death.

Section 5342, applicable to "attempts to commit the crime of murder or manslaughter," is not applicable to this case, for the assault here was "with a dangerous weapon."

Section 5346, providing for assault, has no application, as it is limited to offenses committed upon the water.

Thus the only crimes in the Indian country growing out of injury to the person made punishable are assault with a deadly weapon where no considerable provocation appears, which is, under the act of March 1, 1889, made a *misdemeanor*, and "murder." Assault and assault with intent to commit murder are not separate offenses when there was murder.

MURDER AND WHAT THE CHARGE INCLUDES AND WHAT NOT IN RESPECT OF PLEA OF FORMER JEOPARDY.

While there are no common-law offenses against the United States (*United States* v. *Hudson*, 7 Cranch, 32; *United States* v. *Britton*, 108 U. S., 206; *United States* v. *Eaton*, 144 U. S., 687), yet in the use of words in statutes it can not be doubted that they were adopted with the meaning given them by the common law, unless an intention to modify them appears. (*Pennock* v. *Dialogue*, 2 Pet., 1, 21; *McDonald* v. *Hovey*, 110 U. S., 619, 628; see also *United States* v. *Knight*, 156 U. S., 10.)

If a good indictment for murder, *and evidence making out the same case as this*, would sustain a conviction for assault, or for an assault with intent to commit murder, on the theory that these were minor offenses necessarily included within the charge of murder, then it would follow that the plea of M. F. Ball that he was acquitted, and of J. C. Ball and Boutwell that they were convicted and that they have been once in jeopardy, would be good.

If, on the contrary, upon the proof of felonious, willful, malicious assault, *with death intervening within the jurisdiction, before indictment, within a year and a day*, upon an indictment for murder, there could be no conviction for assault, or assault with intent to kill, then the pleas must fail.

The Government relies on the following propositions:

A.

Former jeopardy is not a good defense where the acquittal or conviction was upon an indictment insufficient in form and substance to sustain a conviction. (*People* v. *McNealy*, 17 Cal., 333; *People* v. *March*, 6 Cal., 543; *Black* v. *State*, 36 Ga., 447; *Mount* v. *Com.*, 2 Duv. (Ky.), 93; *Com.* v. *Bakeman*, 105 Mass., 53; *Cochrane* v. *State*, 6 Md., 400; 2 Hale, P. C., 245, 248; *State* v. *Williams*, 5 Md., 82; *People* v. *Cook*, 10 Mich., 164; *Kohlheimer* v. *State*, 39 Miss., 548; *Walton* v. *State*, 3 Sneed, (Tenn.), 687; 2 East, P. C., 519; *Rex* v. *Vandercomb*, 2 Leach, Crown Cas., 708; *Reg.* v. *Vaux*, 4 Coke, 44a; *Weston* v. *State*, 63 Ala., 155; *People* v. *Barrett*, 1 Johns. (N. Y.), 66; *Munford* v. *State*, 39 Miss., 558; *Hite* v. *State*, 9

Yerg. (Tenn.), 357; *People* v. *Clark*, 67 Cal., 99, 7 Pac., 178; *Pritchett* v. *State*, 2 Sneed (Tenn.), 285; *Gerard* v. *People*, 3 Scam. (Ill.), 363; *State* v. *Ray*, Rice (S. C.), 1; *State* v. *Meekins*, 41 La. Ann., 543, 6 South., 882; Clark's Criminal Procedure, p. 389; *Wiggs Case*, 4 Co., 46b; *United States* v. *Gilbert*, 2 Sumn. 19, 40.)

B.

Assaults, batteries, and wounding were misdemeanors at common law. (Blackstone, IV, 216.)

The assault, the punishment for which is provided for in the *Act of March 1, 1889* (1 Supplement to the Revised Statutes, 675), is not only made a misdemeanor in name, and thus distinguishable from a felony, but the punishment that can be imposed, which is imprisonment not exceeding a year, takes it out of the class of felonies, even if it had not been distinctly declared to be a misdemeanor, for it is not infamous.

A felony could only be proceeded against *by a presentment or indictment of a grand jury.*

A misdemeanor may be proceeded against by an information filed by a district attorney, without the presentment of a grand jury. (*Mackin* v. *United States*, 117 U. S., 348.)

C.

At common law the "attempt to commit murder" was a distinct offense and punishable as a misdemeanor. (Russell on Crimes, vol. 1, p. 719.)

Bishop, in his work on criminal law, section 604, defines "attempt" as follows:

> If a man undertakes to do a thing which in law is a crime, and, after proceeding a certain way in the doing, is interrupted, or if his effort otherwise miscarries, so that the intended crime is not committed, he is still indictable for what he does, under the name of "attempt."
>
> See also A. and E. Enc. of Law, vol. 4, p. 659.

Attempt to rob, to steal fish, to sell counterfeit money, to rescue, to bribe, were punishable, but these were special cases provided for by statute. Chitty's Blackstone, Vol. IV, star pages 242 and n., 235 and n., 100 (n.), 131 (n.), 140 (n.).

The conviction of an attempt to commit a crime, if the evidence shows a failure of accomplishment, is based on statutes. (*In re Lloyd*, 51 Kans., 501; *State* v. *Frank*, 103 Mo., 129.)

But these statutes usually provide that there can be no conviction for attempt where the evidence shows accomplishment. (*State* v. *Lucey*, 111 Mo., 513; *State* v. *White*, 35 Mo., 500; *State* v. *Mitchell* (Kans.), 38 Pac., 810.)

Thus, where actual perpetration is proven the attempt can not logically exist as a crime, but is a part of and merged in the greater offense.

D.

At common law there could not be a conviction of simple assault, assault and battery, or assault with intent to kill—all of which were misdemeanors—on an indictment for

murder or manslaughter. (1 Chit. Cr. Law, 251; *Rex* v. *Westbeer*, 1 Leach Crown Cases, 14, 2 Strange, 1133; *Com.* v. *Roby*, 12 Pick., 496; Russell on Crimes, vol. 1, p. 778; Clark's Criminal Procedure, p. 351; *Wright* v. *State*, 5 Ind., 527; *State* v. *Scott*, 24 Vt., 127, 129; *State* v. *Johnson*, 1 Vroom (N. J.), 185, 186.)

(This was changed by statute, 1 Vic., c. 85, sec. 11. Russell on Crimes, vol. 1, p. 778.)

While it is admitted (p. 21 of the brief) that there could not be at common law a conviction of a misdemeanor on an indictment for felony, it is contended that this rule has been changed in some of the States.

It is true that the rule has been departed from in some of the States. Some have enacted statutes, and in others the courts have changed the rule.

It is insisted (brief, p. 21) that this qualification of the common law is in effect abolished by section 1035 of the Revised Statutes. Section 1035 of the Revised Statutes only applies, as has been shown, where the attempt to do the act charged is made by statute a separate offense.

There is no United States statute making an attempt to commit murder an offense. There could be no indictment merely for an attempt to commit murder.

It is contended for the Government that if indictment No. 3 had, instead of being for murder, been for "an attempt to commit murder," there could have been no conviction, as there is no such crime defined or made punishable under United States law.

It is insisted (p. 21 of the brief) that the assault with intent to kill is a felony under section 2142, but, as shown

above, this section was superseded by the act of 1889, and therefore the offense was murder or a misdemeanor, and if death had intervened at the time of the indictment there could not be anything less than murder.

The brief (p. 21) adopts the rule laid down by Mr. Wharton: "Where the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first, the plea is generally good."

It is sought then (brief, p. 22) to test this case by that rule, but it will be observed that the test is put upon the proposition that "an acquittal of an assault with intent to kill will bar an indictment for murder."

This, of course, is not sound, unless there could have been an indictment under the United States law for an assault with intent to kill, and unless the indictment upon which there was an acquittal included within its terms the offense of "an assault with intent to kill," both of which propositions are denied.

In this connection (p. 22 of the brief) it is sought to make the plea good under the contention that for murder the prosecutor may carve out as large an offense as he can, but can carve only one.

This doctrine can only apply where the offense carved out is included in the larger offense. This has no application to a misdemeanor and the offense of murder. It can have no application unless the lesser is included in the greater, and, as has been shown, there could be no conviction of misdemeanor on the charge of murder.

It will further be shown that there could be no conviction at common law for an assault, or an assault with

intent to commit murder, when the facts showed that death actually intervened at the time of the assault.

E.

There could not be a joinder in the same indictment at common law for a misdemeanor and a felony. (1 Chit. Cr. Law, 251, 254, 639; *Rex* v. *Gough*, 1 Moody & R., 71; *Stores* v. *State*, 3 Mo., 9; *Scott* v. *Com.*, 14 Grat. (Va.), 687; *United States* v. *Sharp*, 1 Peters C. C., 131; *Rex* v. *Cross*, 1 Ld. Raym., 711; *United States* v. *Scott*, 4 Biss., 29, 30, Fed. Cas. No. 16, 241; *Davis* v. *State*, 57 Ga., 66.)

F.

While an acquittal or conviction on one indictment would bar a subsequent indictment, if the minor offense was included in the first charge, and the defendant could have been convicted of it, yet this rule can not apply where one indictment was for a felony and the other for a misdemeanor. (Clark's Criminal Procedure, p. 398; 1 Chit. Crim. Law, 456; 2 Hawk. P. C., c. 35, sec. 5; *Crosby* v. *Leng*, 12 East, 415; *Com.* v. *Roby*, 12 Pick. (Mass.), 504; *Wright* v. *State*, 5 Ind., 527.)

G.

Where a felony merges the misdemeanor arising out of the same act, there could be no conviction or indictment for misdemeanor on proof of a felony. (Clark's Crim. Proc., p. 398; Wharton's Criminal Pleading and Practice, secs. 456, 465 (9th ed., p. 330); *Wright* v. *State*, 5 Ind., 527; *State* v. *Hottabaugh*, 66 Ind., 223; *State* v. *Cooper*, 1 Green (N. J.), 361, 373.)

II.

Therefore, where an assault is a misdemeanor, an acquittal or conviction on indictment for assault with intent to murder will not bar a prosecution for murder. (Clark's Crim. Proc., p. 399; *Com.* v. *Roby*, 12 Pick. (Mass.), 592; *State* v. *Hattabough*, 66 Ind., 223; *Severin* v. *People*, 37 Ill., 414; *People* v. *Saunders*, 4 Parker Crim. R. (N. Y.), 196; *Murphy* v. *Com.*, 23 Grat. (Va.), 960.)

The proof of death within the jurisdiction of the court and within a year and a day from the stroke which was inflicted within the jurisdiction, establishes the crime of murder.

There could not have been but one crime at common law under this state of facts. What would have been a misdemeanor, if death had not followed, merged in the felony.

Therefore, there could have been no conviction of an attempt to commit murder, nor of the assault which was made a misdemeanor by the act of March 1, 1889, upon the proof of the facts necessary to sustain this indictment.

(I.)

To sustain pleas of autrefois acquit and convict it must appear that the offenses are the same in fact and in law, and that there could have been a conviction under the first indictment on proof of the facts charged in the second. (Clark's Criminal Procedure, 383 (e); *Burns & Cary* v. *People*, 1 Parker, 182; *Rex* v. *Vandercomb*, 2 Leach's Crown Law, 708, 717, 720; *Rex* v. *Plant*, 7 Car. and P., 575; *Com.* v. *Clair*, 7 Allen (Mass.), 525, 526; *Com.* v.

Babcock, 14 Gray (Mass.), 83, 84; *Com.* v. *Roby*, 12 Pick., 496; *Freeland* v. *The People*, 16 Ill., 380; *State* v. *Foster*, 33 Iowa, 526; *Com.* v. *Bakeman*, 105 Mass., 53, 59; *The People* v. *Saunders*, 4 Parker, 196.)

In the De Salvi Case, reported as a note to the Morris Case (X Cox Cr. Cas., p. 481, *et seq.*), Pollock, C. J., said:

> We are of opinion that this is not a good plea. The prisoner is now indicted for murder, and murder may be committed without any intent to kill. * * * On the former occasion the prisoner was charged with wounding with intent to kill. The jury found that he did not intend to kill, and there the intention was of the essence of the crime; that is not so in the present indictment; it is not necessary here to prove an intention to kill, it is only necessary to prove an intention to inflict an injury that might be dangerous to life, and that it resulted in death; that is sufficient to sustain the present charge. Try this by the very test presented to us. It is said that it is no bar to the second indictment that a party has been acquitted on the first unless the facts proved on the second indictment might have produced a conviction on the first. But a party may be convicted upon an indictment for murder by evidence that would have no tendency to prove that there was any intent to kill; nay, by evidence that might clearly show he meant to stop short of death, and even took some means to prevent death, but if that illegal act of his produces death, that is murder. * * * It appears to me, therefore, with reference to all the authorities that have been laid before us, that the two offenses are not the same, that the plea can not be supported, and that the prisoner must answer over. I am author-

ized to state that Mr. Justice Crompton and Mr. Baron Watson, before whom the case came at the last sessions, have looked into the matter, and concur in the view now taken.

Martin, B., said:

Now, the offense for which the prisoner has been tried was one of intent, and was therefore complete the moment the stab was given, whereas the offense for which he was now indicted could only be consummated by the death of the party. To the mind of a lawyer this must be deemed conclusive against the plea.

Willes, J., said:

In order to support this plea it must be shown that the former acquittal was an acquittal of all that state of facts which might constitute the party a murderer.

NO JEOPARDY WHERE JUDGMENT REVERSED.

Even if the foregoing be unsound, yet the pleas of J. C. Ball and Boutwell of former jeopardy must fail, because they made a motion for a new trial, after conviction, and by writ of error had the judgment reversed.

The brief for plaintiffs in error says:

Plaintiffs in error J. C. Ball and R. E. Boutwell suggest that they do not now and never have complained at indictment No. 3, nor the verdict rendered thereon; that on the former appeal they urged that said indictment was insufficient to support the sentence of death pronounced against them on that verdict, but the sentence of death was the order appealed from and the one they asked to have reversed (pp. 36, 37).

The trouble about this statement is about the same as Voltaire attributed to the designation of the German Empire in the Middle Ages as "the Holy Roman Empire." He said it was neither "Holy," "Roman," nor "an Empire."

1. The said defendants "moved the court for a new trial, and to arrest the judgment, and suspend sentence upon the verdict of the jury rendered therein, and to set aside and vacate said verdict." (See original record, *Ball et al.* v. *United States*, No. 1351, October term, 1890, p. 7.)

2. The assignments of error in the same record (p. 24), said "they have been tried and convicted without due process of the law of the land."

The first assignment was that "*no legal indictment was returned into court against respondents.*"

The second was that the court erred in overruling the motion of defendants for *a new trial.*

The conclusion was (p. 26), "for the errors stated, and apparent upon the record herein, respondents pray that *the judgment be reversed* and *the cause remanded for a new trial.*"

3. As shown above, the court ordered that the judgments be reversed. (140 U. S., p. 136.)

If a new trial be granted on the defendants' application, the former trial is no bar to a second trial on the same or an amended indictment. (Wharton's Crim. Plead. and Pr., sec. 435 a; Am. and Eng. Enc. of Law, vol. 11, p. 960, and cases there cited; *People* v. *Cashorus*, 13 Johns., 351; *Reg.* v. *Drury*, 3 Car. & K., 193; *Com.* v. *Roby*,

12 Pick. (Mass.), 502; *Sutcliffe* v. *State*, 18 Ohio, 469; *Gibson* v. *Com.*, 2 Va. Cas., 111; *People* v. *McKay*, 18 Johns. (N. Y.), 212; *Com.* v. *Gould*, 12 Gray (Mass.), 173; *Lane* v. *People*, 5 Gilm. (Ill.), 305; *State* v. *Lee*, (N. C.), 19 S. E., 375; *State* v. *Knouse*, 33 Iowa, 367; *State* v. *Redman*, 17 Iowa, 329; *Robinson* v. *State*, 23 Tex. App., 315; *People* v. *Barrie*, 49 Cal., 342; *Lovett* v. *State*, 33 Fla., 389; *Gannon* v. *People*, 127 Ill., 507; *People* v. *Schmidt*, 64 Cal., 260; *People* v. *Hardisson*, 61 Cal., 378; *State* v. *Rhodes*, 112 N. C., 857; *Veatch* v. *State*, 60 Ind., 291.)

After a reversal, they were not again in jeopardy until the new indictment and trial, and the fact that the indictment was quashed or that the case was dismissed would make no difference, for there could be no jeopardy until the jury was impaneled. (*McKenzie* v. *State*, 26 Ark., 334.)

The entry of a nolle prosequi by competent authority does not put an end to the case, and is no bar to a subsequent indictment for the same offense. (*United States* v. *Shoemaker*, 2 McLean, 114; *Com.* v. *Wheeler*, 2 Mass., 172; *Com.* v. *Lindsay*, 2 Va. Cas., 345; *Wortham* v. *Comm.*, 5 Rand., 669; *State* v. *Blackwell*, 9 Ala., 79.)

On page 36 of the brief it is said that "the dismissal of indictment No. 3 after verdict of conviction is equivalent to an acquittal. (*Fletcher* v. *United States*, 9 Fed. Cases, 274; 1 Whar. Crim. Law, secs. 544 and 513; *State* v. *Elden*, 41 Me., 165.)"

In the cases cited there was a dismissal of the indictment after a conviction, without a new trial or reversal, and therefore they have no application to the question under consideration.

If in the plea of autrefois convict there be an averment of the reversal of the judgment and dismissal of the indictment, the plea would be bad. (*State* v. *Thurston*, 3 Heisk., 67; *Bolce* v. *People*, 73 Ill., 320.)

The record will be worthless in evidence if it shows that the indictment was quashed. (*Faulk* v. *The State*, 52 Ala., 415; *Steck* v. *State*, 28 Ark., 113.)

ASSIGNMENT II.

Assignment No. 2, discussed on pages 37 et seq. of the brief for plaintiffs in error, is as follows:

> The court erred in refusing to first try the special plea of the defendant M. F. Ball to the jurisdiction of the court, before these defendants were required to announce ready upon the merits of the case (which said special plea is made a part of the record herein, here referred to and made a part thereof), because by submitting said special plea to the jury, together with the other issues in the case, there was created before said jury a multiplicity of issues, was liable to mislead and confuse them, and, by hearing all of the facts, prejudice them against the said M. F. Ball, and thereby influence said jury in finding against his said special plea. (Rec., p. 140.)

It is contended that there should be a reversal as to M. F. Ball, because, as is said in the brief (p. 38), the plea to the jurisdiction was not excepted to; it was sufficient to raise the question, and plaintiff in error M. F. Ball was entitled to have it heard and determined before he was required to plead to the general issue.

The plea appears on pages 11 and 12 of the record. It does not appear in anyway that M. F. Ball insisted on his plea. It was filed April 30, 1894. (Rec., p. 12.)

On the 1st day of May, 1894, he announced ready for trial, and without any action having been taken by the court upon this plea, he entered a plea of not guilty. (Rec., p. 14.)

He thus waived his right to have a preliminary disposition of this special plea, and having failed to ask action of the court upon it, he can not now predicate error thereupon.

He, however, got the benefit of the plea in the trial and under the charge of the court. (Rec., p. 133.)

ASSIGNMENT I.

The first assignment of error, discussed on pages 38 to 45 of the brief, is as follows:

> The court erred in overruling these defendants' amended motion in arrest of judgment, filed herein on the 6th day of June, A. D. 1894, and in not setting aside the judgment entered against the defendants, and in not quashing the indictments upon which these defendants were tried and convicted, because said indictment charges no crime under the laws of the United States, will not support the verdict of the jury finding them each guilty of murder and the judgment of the court adjudging them each guilty of that offense, and because said indictment is fatally defective in this:
>
> First. Said indictment fails to allege upon what part of the body of deceased the fatal wounds were inflicted and fails to give any description of said fatal wounds.
>
> Second. Said indictment fails to allege that deceased, Wm. T. Box, died of the wounds charged to have been inflicted upon his body by these defendants.

Third. Said indictment fails to allege that the deceased, Wm. T. Box, was killed by these defendants, or either of them, at a place within the sole and exclusive jurisdiction of the United States.

Fourth. Said indictment fails to allege facts sufficient to show that the circuit court of the United States in and for the eastern district of Texas, at Paris, Texas, had jurisdiction to try these defendants, or either of them, for the killing and murdering of deceased, Wm T. Box, in that it does not aver that the deceased, Wm. T. Box, or either of these defendants, were not, at the time said deceased was killed, members of any tribe of Indians in the Indian Territory by marriage or adoption, but simply avers that these defendants were not citizens of the Indian Territory.

Fifth. Said indictment fails to allege that the deceased, Wm. T. Box, died within the jurisdiction of the circuit court in and for the eastern district of Texas. (Rec., pp. 139, 140.)

The points insisted on for plaintiffs in error are:

First:

The indictment fails to allege that Box died of the mortal wounds inflicted by plaintiffs in error.

The language, "of which mortal wounds the said William T. Box did languish and languishing did then and there die," is not sufficient. Box may have died from other causes than the mortal wound. It does allege that he languished of the mortal wound, but not that he died. (Brief, p. 42.)

Again:

In the present case the indictment may be true and plaintiffs in error not guilty of murder. Box may have been mortally wounded by a gunshot wound fired by plaintiffs in error; he may have

> languished of the wound and died, but not of the mortal wound inflicted. (Brief, p. 42.)

The language of the indictment is "of which mortal wound the said William T. Box did languish and languishing did then and there instantly die."

The plain intent of this is that he then and there languished and died of the mortal wound. The words "mortal wound" qualify the words "did languish and languishing," and the words "did then and there instantly die." The brief seeks to make it read as follows: "The said William T. Box did languish of said mortal wound and languishing did then and there instantly die."

In *Davies* v. *The King* (10 B. and C., 89, 92) Lord Tenderden said:

> The phrase used is that the defendants "did by night unlawfully enter divers closes, and were then and there in the said closes," etc., not that they "by night did unlawfully enter, and," etc. If the words "by night" had occurred at the beginning of the sentence, they might have governed the whole, or if they had been at the end of the sentence, they might have referred to the whole, but here they are in the middle of the sentence, and are applied to a particular branch of it, and can not be extended to that which follows.

Here the words "of which mortal wound" precede, and therefore are referable to and qualify all that follows. Besides, under the well-settled rule that where but one place had been stated in the indictment, the words "then and there," in the subsequent averment necessarily refer to that place, excludes the construction contended for

here. There is no room for saying that the indictment avers that he languished at any place other than the one place mentioned in the indictment.

Second. The indictment fails to allege the place of death. It is not charged to have taken place within the jurisdiction of the court. (Brief, p. 43.) The brief says:

> The charge that "of which mortal wound the said Wm. T. Box did languish, and languishing did then and there instantly die, and did then and there die within a year and a day after the infliction of the said mortal wound as aforesaid," is not sufficient.
>
> The indictment does not charge "that said Box did then and there languish, and languishing did then and there instantly die." This language does not allege where Box languished, but it imports that he lived after the mortal wound was inflicted, and after languishing did then and there instantly die, i. e., at the place where he languished. The language used by the pleader, "did languish, and languishing did then and there instantly die," clearly imports some lapse of time after the reception of the mortal wound before death occurred; "then and there" employed in the sentence and used after the words "did languish," and refer to the time of the languishing and not to the time of the infliction of the fatal wound. (P. 44.)

This is hypercritical. The indictment avers:

> That one M. F. Ball and one J. C. Ball and one J. E. Boutwell, late of Chickasaw Nation, Pickens County, Indian Territory, in the district and circuit aforesaid, on the twenty-sixth day of June, in the year of our Lord eighteen hundred and eighty-nine, in Pickens County, in the Chickasaw Nation, in the Indian Territory, the same being annexed to and constituting a part of the said fifth circuit, and

annexed to and constituting a part of the eastern district of Texas, for judicial purposes, and being within the jurisdiction of this court did unlawfully, fraudulently, and feloniously, and with their malice aforethought, and with the malice aforethought of each of them, and with a certain deadly weapon, to wit, a certain gun by the said M. F. Ball, J. C. Ball, and R. E. Boutwell then and there held, make an assault in and upon the body of one William T. Box, with said gun held as aforesaid, said gun being then and there loaded and charged with gunpowder and leaden balls, then and there held and used as aforesaid, the said M. F. Ball, J. C. Ball, and R. E. Boutwell did then and there shoot off and discharge the contents of said gun at, in, and upon the body of said William T. Box, inflicting thereon a mortal wound, of which mortal wound the said William T. Box did languish, and languishing did then and there instantly die, and did then and there die within a year and a day after the infliction of the said mortal wound as aforesaid. (Rec., p. 2.)

The language "of which mortal wound the said William T. Box did languish, and languishing did then and there instantly die, and did then and there die within a year and a day after the infliction of the said mortal wound as aforesaid" can bear no other construction than that he died "then and there" where the mortal wound was inflicted. The place and the only place mentioned in any part of the indictment was "in the Chickasaw Nation, in the Indian Territory, the same being annexed to and constituting a part of the said fifth circuit, and annexed to and constituting a part of the eastern district of Texas, for judicial purposes, and being within the jurisdiction of this court."

The words "then and there" are definite and are the controlling words. The words "languishing" and "instantly" are indefinite, and, therefore, are subordinate to the words "then and there."

It is well settled that the words "instantly," "immediately," and "whilst" are ambiguous terms, and can not supply the place of "then and there." If they can not supply the place because they are ambiguous, then still less could they and like words control the meaning of the words "then and there."

Relatives in indictments are not controlled by the strict rules of grammar, and they are held to refer to that antecedent to which the tenor of the instrument and the principles of law require that they should relate, whether exactly according to the rules of syntax or not, and this applies also to such words as "it" and "then and there." (Bishop on Crim. Proc., sec. 355; *Jeffries* v. *Comm.*, 12 Allen (Mass.), 145; *Comm.* v. *Call*, 21 Pick., 515.)

The doctrine is general that the court will consult sound sense, to the disregard of captious objections, in looking for the meaning of allegations in an indictment. Moreover, of two permissible constructions, it will adopt the one sustaining the proceeding. (Bishop on Crim. Proc., vol. 1, sec. 356, 510.)

After mentioning the time and place with certainty, the usual form is not to repeat them but to prefix the words "then and there" to each subsequent averment of fact. (Bishop on Crim. Proc., sec. 408; Whar. Crim. Pl. and Pr., sec. 131.) If only one time and place has

been averred, there can be no uncertainty as to what the words "then and there" refer to.

There would be if more times and places than one had been mentioned. (Bishop on Crim. Proc., sec. 414; Whar. Crim. Pl. and Prac., sec. 133.)

In *Jeffries* v. *The Commonwealth* (12 Allen, 145, 152) the court said:

> We are to give effect to the time and place alleged in the venue as applicable to subsequent parts of the indictment when no other place is named to which they may equally or, as the case may be, directly refer.

Again:

> If it be said that the words "then and there," found in the indictment after the naming of the city of New York as the residence of the persons alleged in the indictment to have authorized the defendant to purchase such linseed, grammatically and therefore legally refer to the next antecedent, that must be taken with some qualification, as was stated by this court in *Commonwealth* v. *Call* (21 Pick., 515), where it was held that words must be referred to that antecedent to which the tenor of the indictment and the principles of law required it should refer, whether exactly according to the rules of syntax or not.

ASSIGNMENT VI.

Severance.

This question is treated in the brief for plaintiffs in error (p. 20 *et seq.*).

It is based on the sixth assignment, which is as follows:

> The court erred in overruling the written motion of the defendants J. C. Ball and R. E. Boutwell,

> filed herein before this case was called for trial, asking that they be awarded a separate trial from their codefendant M. F. Ball, and in forcing them to be tried jointly with their said codefendant M. F. Ball because said motion, which is made a part of the record in this cause and here referred to, stated facts sufficient to entitle them to a separate trial in this cause. (Rec., p. 141.)

The motion for a severance made by M. F. Ball is set out on page 12 of the record.

The motion for a severance made by J. C. Ball and R. E. Boutwell appears on page 13 of the record.

Where several persons are jointly indicted, the question of severance is a matter within the discretion of the court. (Wharton's Crim. Plead. and Prac., Sec. 309; Bishop on Crim. Proc., vol. 1, sec 1018; Archbold's Crim. Prac. and Plead., 8th ed., p. 303, note (1); *United States* v. *Merchant et al.*, 4 Mason, 158).

While the motions are sworn to, the record does not show that any evidence was adduced to sustain them. So far as the record shows, the court acted upon the bare motions themselves.

It certainly was no abuse of the discretion of the court to refuse to grant a severance based upon facts which are not shown except upon the affidavit of the defendants.

ASSIGNMENT VII.

The seventh assignment is discussed on pages 48 and 49 of the brief, and is as follows:

> The court erred in sustaining the objection of the district attorney and in preventing these defendants from proving by the Government witness Joe Cross

how much money he and Ed. Berney (both of whom were material witnesses for the Government in this case) had paid or promised to pay Mr. Owenby for his services in assisting the district attorney in the prosecution of this case, because the same was a legitimate inquiry upon the trial of this cause, in that it tended to show the interest and feeling of said witnesses in this prosecution. (Rec., pp. 141, 142.)

The record shows the following:

Q. Do you know who employed Mr. Birmingham to help prosecute in this case?

A. Yes, sir; Ed. Berney.

Q. He is the one that is here?

A. Yes, sir.

Q. Who employed Mr. Ownby?

A. Ed. Beraey and myself employed Mr. Ownby.

Q. You paid him out of your private means?

A. I always pay my debts that way.

Q. How much do you pay him?

(To which question and proposed answer counsel for the Government objected. Defendants' counsel then stated to the court that they desired said proof for the purpose of showing the interest of the witness in this prosecution, as well as to show the interest of Ed. Berney, another material witness for the Government, but the court sustained the objection so made by the Government, and would not permit said question to be answered, to which action and ruling of the court the defendants each at the time excepted.) (Rec., pp. 47, 48.)

Q. You have been interested some in the prosecution of this case, have you not?

A. Yes, sir.

Q. You have assisted in the prosecution of this case?

(To which question and proposed answer counsel for the defendant at the time objected because the same was irrelevant and immaterial, but their objections were by the court overruled and said witness permitted to testify as follows:)

Q. You stated you and Cross employed counsel to help prosecute in this case?

A. Yes, sir.

Q. Was your employment of counsel in this case caused by any ill feeling you had toward these defendants?

(To which question and proposed answer counsel for the defendant at the time objected because the same was irrelevant and immaterial, but their objections were by the court overruled and said witness permitted to testify as follows:)

A. It was not. (Rec., p. 110.)

The material evidence for the jury to consider was the interest and bias of these witnesses. The court permitted it to be shown that they had employed counsel to prosecute. This showed their interest, and the question of the amount paid by them was not material They paid enough to have his services, and that showed their interest, and the jury could look to this in weighing their testimony.

It was perfectly competent and relevant in this connection to permit the witnesses to testify that in this they were not actuated by ill feeling, and it was for the jury to pass upon this evidence and weigh it for what it was worth.

As has been repeatedly held by this court, the admission and exclusion of evidence and its materiality are largely within the discretion of the trial judge, and his

action in admitting or excluding evidence would not be reversible error unless it appears that the defendants may have been injured. (*Alexander* v. *United States*, 138 U. S., 353; *Holmes* v. *Goldsmith*, 147 U. S., 150; *Moore* v. *United States*, 147 U. S., 150; *Thiede* v. *Utah Territory*, 159 U. S., 510.)

ASSIGNMENT X.

This assignment is discussed on pages 49 to 53 of the brief, and is as follows:

> The court erred in admitting in evidence, over the objection of these defendants, a certified copy of a marriage license under the hand and seal of the clerk of Cooke County, Texas, showing that S. C. Mayfield married Lucy O. Box prior to the time she married the defendant herein, M. F. Ball (which said certified copy was made a part of the record herein and here referred to), because the Government thereby proved the contents of a written instrument by substitutionary evidence without showing the loss or destruction of the original, and because said marriage license, or a certified copy thereof, was not indorsed upon the back of the indictment against these defendants, and because they had no notice whatever that the Government would offer said marriage license or a certified copy thereof in evidence against them, and because said marriage license raised an issue in this case, to wit, the validity of the marriage of M. F. Ball with Lucy O. Box, alias Lucy O. Mayfield, which these defendants, and especially the said M. F. Ball, was not prepared to meet, and did not know would be raised upon the trial of this cause. (Rec., p. 142.)

Two objections are made in the brief:

1. It is said that a certified copy of the marriage license was secondary evidence, and therefore incompetent, without any effort to produce the original and without accounting for its loss or destruction.

The certificate by the clerk of the county court of Cooke County, Tex., was to the effect that it was a true and correct copy of the marriage records of that county. (Rec., pp. 119, 120.)

Article 2842 of the Texas statutes provides:

> The said clerk shall record all licenses so issued by him in a well-bound book kept for that purpose, and it shall also be the duty of the persons solemnizing the rites of matrimony to indorse the same on the license and make return of the same to the office of the clerk of the county court within sixty days after the celebration as aforesaid, which return shall also be recorded as aforesaid.

Article 2252 provides as follows:

> Copies of the records of all public officers and courts of this State, certified to under the hand and seal (if there be one) of the lawful possessor of such records, shall be admitted as evidence in all cases where the records themselves would be admissible; translated copies of all records in the land office, certified to under the hand of the translator and the Commissioner of the General Land Office, attested with the seal of said office, shall be *prima facie* evidence in all cases where the original records would be evidence.

No objection was made to the form of certification. The objection went alone to the admissibility of a certified copy.

The certified copy was competent evidence in the courts of Texas, and therefore was competent in the United States court there held. (*Cavazos* v. *Travino*, 6 Wall., 773, 786.)

A certified copy of the public registry of marriage is competent evidence. It is not "secondary evidence." (Roscoe's Crim. Ev., vol. 1, p. 174; A. and E. Enc. of Law, vol. 14, p. 523.) It is what is sometimes termed a "second original."

The admissibility of the certified copy was objected to on the ground that it was not indorsed upon the back of the indictment against these defendants, and that neither of them had any notice whatever that the said marriage license would be introduced in evidence against them. (Brief, p. 52.)

This objection is based upon section 1033 of the Revised Statutes, which is as follows:

> When any person is indicted of treason, a copy of the indictment and a list of the jury, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each juror and witness, shall be delivered to him at least three entire days before he is tried for the same. When any person is indicted of any other capital offense, such copy of the indictment and list of the jurors and witnesses shall be delivered to him at least two entire days before the trial.

This section is in derogation of the common-law rule. The brief says (p. 52) that "no difference in principle could exist between a document and a living witness."

The difference is not in the principle, but in the statute, and its application. It applies to living witnesses and has no application to documents.

ASSIGNMENT XI.

This assignment, discussed on pages 53 to 56 of the brief, is as follows:

> The court erred in allowing Mrs. L. O. Angling to testify, over the objection of these defendants, that "she thought she was legally married to one of these defendants, to wit, M. F. Ball, but had learned since that she was not legally married to him, and that at the time she so married the defendant M. F. Ball her former husband, C. S. Mayfield, was living; that she had never been divorced from him, and that the defendant M. F. Ball knew that said Mayfield was living at the time she so married the said M. F. Ball," because the said M. F. Ball, prior to the time said witness so testified, introduced in evidence in this case a marriage license, issued by the legal authorities of the Chickasaw Nation, Indian Territory, showing that he, the said M. F. Ball, had, prior to the time Wm. T. Box was killed, married the said witness, and said witness testified, prior to the time said evidence was introduced, that she married the said M. F. Ball under said license and lived with him as his wife up to the time her father, Wm. T. Box, was killed, and that she had never been divorced from him, and was therefore not a competent witness in this case. (Rec., p. 143.)

The reference made on page 53 of the brief under this assignment is to page 143 of the record.

Upon page 143 of the record is nothing but the assignment as set out in the brief.

There is nothing showing that Mrs. Angling testified, over the objection of defendants, that "she thought she was legally married to one of these defendants, to wit, M. F. Ball, but had learned since that she was not legally married to him, and that at the time she so married the defendant M. F. Ball her former husband, C. S. Mayfield, was living; that she had never been divorced from him, and that the defendant M. F. Ball knew that said Mayfield was living at the time she so married the said M. F. Ball."

That part of her testimony which was relevant to this assignment, and which was printed at the instance of plaintiffs in error, appears upon pages 1 and 2 of the supplemental record. She does not say that "she thought she was legally married to one of these defendants, to wit, M. F. Ball." She does not say that she "had learned since that she was not legally married to him." She does not say that Mayfield was alive at the time she married Filmore Ball and that Ball knew he was living.

As to which of the statements set out in the assignment the objection was intended to cover, there is no specification.

The exception, which is set out on page 1 of the supplemental record, was as follows:

> Counsel for the defendants then objected to the said witness testifying against either of them, because she was the wife of the said M. F. Ball, one of the defendants herein.

An examination of the testimony set out on pages 1 and 2 of the supplemental record does not show that she gave any testimony against any of the defendants in respect of the crime charged. The entire testimony set out is simply upon the question of her marriage, and the court said, "It is only on the ground of the plea of jurisdiction of this court that I admit it; only to prove the plea of the defendant to the jurisdiction of this court as to what her husband knew." (Supplemental Rec., p. 2.)

The Government introduced the certificate showing the former marriage to Mayfield. (Rec., p. 119.)

Thus there was no question about that marriage and its validity.

There was a question as to the validity of the second marriage. The rule that the wife is incompetent to testify extends only to the lawful husband and wife. (Roscoe's Crim. Ev., p. 190; 2 Starkie Ev., p. 402; Greenleaf on Evidence, vol. 1, sec. 339.)

In Peake's Evidence (Norris), page 248, it is said:

> It is clearly settled that a woman who never was legally the wife of a man, though she has been in fact married to him, may be a witness against him; as in an indictment for bigamy, the first marriage being proved by other witnesses, the second wife may be examined to prove the marriage with her, for she is not *de jure* his wife.

When the first marriage is established to the satisfaction of the court, then the wife under the second marriage is a competent witness in respect of the second marriage, because she is not a *de jure* wife. (*Miles* v. *United States*, 103 U. S., 304, 315; Am. and Eng. Enc.

of Law, vol. 14, p. 526; Rice Crim. Ev., vol. 3, sec. 516; Greenleaf on Evidence, vol. 1, sec. 339.)

Husband and wife are competent to prove the marriage or the contrary. (2 Starkie on Evidence, 6th Am. ed., 404.)

On page 55 of the brief is the following:

> The wife can not testify against the husband. (1 Greenleaf, 834.) When *prima facie* proof is given of the fact that a woman is the wife of a party to a suit, she is incompetent to rebut this proof. (*Ross* v. *Niles*, Abb. Adm., 411.) When the fact of marriage is controverted, the wife is incompetent. (2 Stark. Ev., 400; Grigg's Case, 7 Royne, 1; *Campbell* v. *Tweedale*, 1 Price, 81.)

This is the full argument on this point.

The case of *Rose* v. *Niles* has no application to the question here.

There the court said there was *prima facie* proof of the marriage, and this rendered the deposition of his supposed wife inadmissible. It was not a case where there was, as in this instance, *prima facie* proof of a former marriage and where the evidence objected to was in respect of the validity of the second marriage.

The court said in the case of *Rose* v. *Niles:*

> There is, however, a further question in the case, for the evidence on the part of the respondents amounted to *prima facie* proof of a marriage *de facto et de jure*, and the only evidence offered by the libellant to rebut this presumption and remove the apparent incompetency was the testimony of the supposed wife herself. But she already stood before the court in the character of the lawful wife of libellant, and

as such must be excluded from testifying for him until the disqualification is removed (p. 415).

The statement in the brief that "when the fact of marriage is controverted the wife is incompetent" is not borne out by the authorities cited.

Grigg's Case is erroneously cited in the brief. It is in T. Raymond, 1.

In that case a woman was indicted for bigamy, and the first husband was called as a witness to prove the first marriage. The very essence of the charge was that the first marriage was lawful, and, of course, it followed as a necessary conclusion that the first husband was in no sense a competent witness.

The case of *Campbell* v. *Tremlow* (1 Price, 81) did not decide the question at all, all of the judges expressly declining to pass upon the question of the competency of the witness. (See pp. 88–91.)

Greenleaf says "but if the proof of the first marriage were doubtful, and the fact were controverted, it is conceived that she would not be admitted. It seems, however, that a reputed or supposed wife may be examined, on the *voir dire*, to facts showing the invalidity of the marriage." (Vol. 1, sec. 339.)

ASSIGNMENT XIII.

The thirteenth assignment, discussed on pages 56 to 57 of the brief, is as follows:

The court erred in refusing to require the officers of the Government to deliver to these defendants, or some other competent person, the gun introduced in evidence, for the purpose of testing the said gun as to

> the manner in which it would shoot "low-mould" buckshot, because said gun was the property of the defendant J. C. Ball, but had been in the exclusive possession of the Government's officials since shortly after the killing of Wm. T. Box in 1889; defendants made said request before they closed their case; it was an admitted fact that the deceased, Wm. T. Box, was killed with a shotgun loaded with "low-mould" buckshot, held by someone at a distance of 8 or 10 feet away; that the shot penetrated his body from his shoulder to his hips; the Government witness Blunt testified that the gun in court, and the property of the defendant J. C. Ball, would scatter "low-mould" buckshot badly; defendant J. C. Ball testified that he never shot low-mould buckshot from said gun. The fact as to how said gun would shoot "low-mould" buckshot was a material enquiry in this case, and a practical and thorough test of said gun would have accurately settled the disputed question as to whether said gun fired the shot that killed Wm. T. Box, as claimed by the Government, or whether it did not fire said shot, as contended by these defendants. (Rec., pp. 143, 144.)

There is nothing in the printed record showing any exception upon which this assignment is based.

The assignment shows no ground for reversal. The argument to sustain it in the brief is in substance that it was an admitted fact that Box was killed with a shotgun, loaded with low-mold buckshot, held by someone at a distance of 8 or 10 feet away; that the shot penetrated his body from his shoulders to his hip. It is next said that there was testimony showing that the gun in court would scatter low-mold buckshot badly, and that this fact was a material inquiry in the case. It is further

said that Blunt testified that said gun would scatter buckshot badly, and that at a distance of 15 or 20 feet you could hit nothing with it. (Brief, pp. 56, 57.)

There is nothing to show that it was an admitted fact that Box was killed by a gun held at a distance of 8 or 10 feet away. No witness saw the killing. A gun might scatter badly at 15 or 20 feet and yet not do so at a distance of 8 feet. This would be subject to great variation, owing to the character of powder used, the character and number of wads used, and whether or not they were rammed upon the powder, or upon the shot, or upon both. There is no evidence as to the number of shot that were in the gun when it was fired. *Non constat* that the gun in this case did not scatter badly. A number of the balls may have missed Box. Such an experiment would have been worthless, unless upon the conditions as they existed when the murder was committed, and these were not known.

The defendants had the benefit of Blunt's testimony that the Ball gun scattered badly, and it does not appear that there was any evidence contradicting it.

But, aside from all these considerations, it appears that the request was made in the midst of the trial. It does not appear that it was made when it could have been granted by the court without adjourning the trial. This was the second trial of the case, and if it was desired to make such an experiment application should have been made before the trial.

Admitting the power of the judge to grant the request, and the materiality of the testimony, there would be no ground for reversal unless there was something to show

an abuse of discretion by the trial judge, and there is an entire absence of anything tending to establish such proposition.

Counsel (on p. 57) cites Thompson on Trials (sec. 864), and the case of *The Patent Type Foundry Co.* v. *Lloyd* (29 L. J. (Exch.), 207). These were civil cases, and, besides, they do not sustain the doctrine contended for. The Lloyd Case was upon the construction of a statute—15 and 16 Vic., c. 83, s. 42.

In section 905 of Thompson on Trials the rule is laid down that experiments in the presence of the jury are generally refused. The objection would apply with greater force to experiments made when the jury are not present, for the chances of error are increased, the uncertainty of the testimony of the witnesses being added to that of the experiments themselves.

ASSIGNMENT XIV.

The fourteenth assignment, discussed on pages 58 to 61 of the brief, is as follows:

> The court erred in admitting in evidence against these defendants, and especially against the defendants J. C. Ball and R. E. Boutwell, over the objections of these defendants, the testimony of Mrs. Rider, who testified in substance as follows: "After the killing, on the morning of June 27th, 1889, M. F. Ball (Filmore) told me that they were going to arrest him, but that he did not care, as he could prove out of it; that there were two men who stayed all night with him, by whom he could prove where he was; that they could not prove anything against him, and that they never would dream of John Ball and Bob Boutwell doing such a thing; that they would

take him and try him, but as they could not prove anything against him they would turn him loose. He said he did not see what they were tracking around for; that they could make nothing out of tracks; that he was perfectly satisfied that the tracks would exactly fit J. C. Ball and R. E. Boutwell, but so far as his tracks were concerned he was not afraid of it; he said he did not see why Joe Cross and Ed. Berney were dishing in so deep for; it was none of their business. He asked me how many shots they took out of old man Box's body. I told him, and then he said that he had shot the other load out of J. C. Ball's gun at some chickens and loaded the gun with fresh shot, and he wanted to know of me if I thought they would still think J. C. Ball's gun killed deceased. He said they were going to lay it off on an old woman there. He then told me that if he could he would call the old man back this morning as free as he ever done anything in his life. I told him it was too late. He then asked me if I had noticed anyone down there eyeing and watching him; I told him I did not, but I did see them. He asked me if he looked bad; I told him he did not; he said that he saw everybody there eyeing him all the time. He told me over a time or two about Berney and Cross tracking around there, and said if it had not been for them tracking around so much that they never would have been bothered."

And in admitting, over the objection of these defendants, the testimony of J. T. Hoover, who testified in substance as follows: "After the other trial, and after M. F. Ball was acquitted, I had a conversation with him about this case. He asked me something about the boys, John Ball and Boutwell. He asked me if I knew anything about them and how they were getting along. I told him no, but that they were in pretty bad shape, I guessed.

He said, 'I guess the boys will not hang;' I said, 'I hope not if they are not guilty.' I told him he ought to do all he could for them, and he said he done about all he could do. I said something about the people thinking that they were all guilty of killing old man Box; he said the people could think and be damned; that so far as he was concerned he could go up and admit that he did kill deceased; that it did not make a damn bit of difference now, as he had come clear and they could not try him for it any more."

Because the same was a declaration made by one of the defendants, M. F. Ball, after the homicide was committed, and was not made in the presence or hearing of the defendants, J. C. Ball and R. E. Boutwell, or either of them, and the same was calculated to mislead the jury and prejudice them against said J. C. Ball and R. E. Boutwell. (Rec., pp. 144, 145.)

The argument made in the brief (pp. 60, 61) to sustain this assignment is that the evidence objected to was a narrative of past events after the alleged combination or conspiracy to murder had come to an end, and that it was not admissible as against J. C. Ball and Boutwell, and that the court erred in not charging the jury that they could only consider it against M. F. Ball.

This objection on its face is sound, but the record shows (p. 96) when the evidence was offered that the following occurred:

COUNSEL FOR DEFENDANTS. We object to anything Filmore said as against any of the defendants except him.

The COURT. *Of course it would only be evidence against Filmore if he said anything.* (Rec., p. 96.)

The declarations of M. F. Ball were clearly admissible in evidence against him, even upon a joint trial with other defendants, and there is no ground on which their exclusion could have been sustained. (*Spurf* v. *United States*, 156 U. S., 54.)

They were not admissible as against J. C. Ball and Bontwell. (*Ib.*, 56.)

Being competent testimony in the case against one of the defendants, and being inadmissible as to the others, the only question to consider is whether or not the jury were sufficiently advised of the purpose for which the testimony was admitted by the above qualification, made by the court when the evidence was offered.

In *Spurf* v. *United States* (156 U. S., 58), the court said:

> We are of opinion that as the declarations of Hansen to Sodergren were not, in any view of the case, competent evidence against Spurf, the court, upon objection being made by counsel representing both defendants, should have excluded them as evidence against him, and admitted them against Hansen.

It would seem from this that it would be sufficient to give the instruction at the time of the admission of the evidence. Indeed, it is perfectly manifest that this would be the proper course, and that it would redound more to the benefit of the defendants than to admit the evidence without qualification, and let it sink into the minds of the jury and form impressions and then undertake to overcome them in a charge upon the entire case.

It has sometimes been doubted whether or not the withdrawal of evidence in a general charge would be

regarded as sufficient to overcome the effects of testimony which had been erroneously permitted to work upon the minds of the jury. As this testimony was clearly admissible, and as it is only a question as to how and when the qualification should be given, it seems the better reason to hold that the trial judge pursued the proper course.

This qualification by the court in the presence of the jury, when the evidence was admitted, was a sufficient instruction to the jury.

If the defendants desired any further instruction on that point, they should have made a request, which they did not do.

The judge, jury, and counsel must have understood that the court only admitted the declarations of Filmore Ball as evidence against him, and it will not do to say that counsel may, without any further objection and without any request, rest on such a qualification of the testimony as was made in this case, and then assign the action of the trial judge as reversible error.

But, independently of this question, the testimony given was not an admission of any fact showing, or tending to show, that any of the defendants had participated in the murder. It is not a narrative of anything that any of them did. Therefore, while it may have been irrelevant, it certainly did not fall within the rule applying to confessions or admissions of coconspirators, but was entirely wanting in such substance.

ASSIGNMENT XVI.

The sixteenth assignment, discussed on pages 61 to 65 of the brief, is as follows:

The court erred in refusing to give to the jury the 3rd special charge asked by the defendant M. F. Ball, which is as follows;

"3rd. If you believe from the testimony in this case that the deceased, Wm. T. Box, was a recognized citizen of the Chickasaw Nation at the time he was killed, and that he had prior to that time married a Chickasaw Indian woman under the laws of that tribe of Indians; and if you further believe that he, the said Wm. T. Box, was residing in said Chickasaw Nation at the time he was so killed; and if you further believe from the testimony that the defendant M. F. Ball, prior to the time said Wm. T. Box was killed, had also married a Chickasaw Indian woman and was recognized by the Chickasaw Government as a member of their tribe by virtue of said marriage with said Indian woman; and if you further believe that he was so recognized at the time Wm. T. Box was killed, and that at that time he, the said M. F. Ball, was residing in the Chickasaw Nation, Indian Territory, then you are charged that this court would not have jurisdiction to try the said M. F. Ball for the offense charged in the indictment herein, and you will find his plea to the jurisdiction of the court to be true."

And the court erred in his general charge when he charged the jury as follows: "M. F. Ball has filed a plea to the jurisdiction of this court, which states in substance that he was married to the daughter of Wm. T. Box; that Box had married an Indian woman living in the Indian country, and as a result of such marriage was the daughter whom

he had married, and that consequently, under the treaty between the Indians and the United States, this court was without jurisdiction to try him. The evidence offered before you first is the marriage license issued in Cooke County, Texas, which authorizes the marriage of Miss Lucy Box, the lady that Filmore Ball afterwards claims to have married, and one Mayfield. Mrs. Mayfield, or Mrs. Ball, testified that she had never been divorced from Mayfield; that she had lived with Mayfield from the time of marriage until a few months prior to her attempted marriage with the defendant, Filmore Ball. The defendant, Filmore Ball, introduces a marriage license, issued in the Chickasaw Nation, signed by the county judge and filed properly there, and that the evidence attending it shows that the marriage had been performed between him and Mrs. Mayfield. You are instructed that if you believe from the evidence that Wm. T. Box, the man that was killed, was a white man living in the Chickasaw Nation, and that he married an Indian woman, and as the result of such marriage was the lady that married Mayfield, or Ball, or both, and you believe from the evidence that she was not married to Mayfield, or that if she had been married to him that she was divorced from him, or he was dead at the time of her marriage to Filmore Ball, in that event you are instructed that the court would not have jurisdiction to try Filmore in this case. But if you believe from the testimony that she married Mayfield, and that she was not divorced from him at the time of her attempted marriage to Filmore Ball, or that Mayfield was not dead, or if he was living at the time of the attempted marriage to Filmore Ball occurred and not divorced from Mayfield, in that event the marriage with Filmore Ball

would be a nullity, on account of her disability to contract the marriage relations, and the court would have jurisdiction, and you would find against his plea to the jurisdiction of the court on that ground."

Because the testimony in the case showed that the deceased, Wm. T. Box, and the defendant M. F. Ball were each members of the Chickasaw tribe of Indians in the Indian Territory at the time the homicide was committed, and that they each resided there at the time Wm. T. Box was killed, and because the court in his general charge to the jury submitted to them for their determination the validity of the marriage of Lucy O. Box, to C. S. Mayfield and the marriage of Lucy O. Box, or Mayfield, to the defendant, M. F. Ball, without any proof having been made of the laws of the Chickasaw Nation governing marriages and divorces in said Chickasaw Nation. (Rec., pp. 146, 147.)

The request which was refused excluded from the jury every consideration of the facts going to show that M. F. Ball could not contract a legal marriage with Mrs. Mayfield. The instruction was that the jury should find in favor of his plea, if it appeared that he had "married a Chickasaw Indian woman," etc. Under this instruction, if the court had given it, they would have been bound to acquit upon finding that a void marriage had been solemnized.

The judge, in his charge, submitted to them the facts bearing upon every question legitimately raised by the plea, and among them whether or not they believed from the testimony "that she married Mayfield, and that she was not divorced from him at the time of her attempted marriage to Filmore Ball, or that Mayfield was not dead."

He instructed the jury that if she had been married to Mayfield, and had not been divorced from him, and he was living, that the marriage with Ball was a nullity, and that if they should find these facts the court would have jurisdiction.

The argument to sustain this assignment, on pages 64 and 65 of the brief, is fatally defective in that it assumes that any sort of marriage, under and by virtue of the laws of the Chickasaw Nation, and a recognition of citizenship by virtue of such marriage and residence in the nation, would, under article 38 of the treaty with the Choctaws and Chickasaws (14 Stat., 769), exclude the jurisdiction of the United States court, regardless of the competency of the parties to contract a marriage.

The treaty, of course, only contemplated a legal marriage, and it was not intended that an American citizen could, by a void contract of marriage, and by fraud, withdraw himself from the jurisdiction of the United States courts.

ASSIGNMENT XX.

The twentieth assignment, which is treated on pages 65 and 66 of the brief, is as follows:

> These defendants have not been convicted by due process of the law of the land in this: The jury that returned the verdict of guilty against the defendants in this case was not placed in charge of a duly sworn bailiff of this court after they were impaneled and charged with this case until they returned a verdict of guilty against these defendants, but, upon the contrary, said jury was in the exclusive con-

> trol of Drumgoole Williams from the time they were impaneled until they returned their said verdict, without any oath whatever being administered to him, the said Drumgoole Williams, as such special bailiff, all of which will be made apparent by an inspection of the record in this cause, here referred to and made a part hereof. (Rec., p. 149.)

The argument (brief, p. 66) to sustain this assignment is as follows:

> When the jury retire to deliberate on their verdict they are put in care of an officer, to whom an oath is administered. (1 Bishop Crim. Proc., secs. 991 and 992; *People* v. *Hughes*, 29 Cal., 257.)

It was the rule at common law, and it is the rule in a number of the States, to put the jury under the care of an officer, to whom is administered a special oath.

The oath that was administered in England is not now administered in this country in any State. (Bishop on Crim. Proc., Vol. I, sec. 991.)

There was no exception to the jury retiring under the care of the officer without a special oath being administered to him. It is not even suggested that anything improper took place, or that any injury accrued, or could have accrued, to either of the plaintiffs in error.

The officer was a deputy United States marshal, was under the direction of the judge, and had taken an oath that he would "in all things well and truly, and without malice or partiality, perform the duties of the office of marshal's deputy." (Revised Statutes, sec. 782.)

It does not appear that the judge did not instruct the marshal as to his duties in keeping the jury. The

presumption is that he did everything that was right and proper in the absence of affirmative evidence to the contrary.

The old common-law system of keeping juries in criminal cases has been greatly modified in practice in this country.

It has been held in a number of States that where the jury are committed to a sworn officer, a special oath need not be administered to him. (*Davis* v. *State*, 15 Ohio, 72; *State* v. *Frier*, 118 Mo., 648; *State* v. *Crafton*, 89 Iowa, 109; *Atterberry* v. *State*, 56 Ark., 515.)

Even though a required oath be not taken by the officer, this would be no ground for reversal, it not being shown that the jury was exposed in such a way as to be operated upon to the prejudice of the defendant. (*Sanders* v. *The People*, 124 Ill., 225.)

Even in a case of separation, Judge Lurton, in a very able opinion, in a case of great note, held that there should be no reversal if nothing occurred calculated to improperly affect the jury, saying that under such circumstances "to set aside a verdict otherwise sustained would be to sacrifice substance to form, and bring the administration of law into just discredit." (*King* v. *State*, 91 Tenn., 626.)

If this assignment be well taken, then it follows that the defendants must all be discharged, and can not be tried again, for having been put in jeopardy they could not again be tried if the jury was disbanded without their consent, and the gist of this assignment is that the jury was no longer a legal body after they went out of the court in charge of one who was not an officer.

ASSIGNMENT XXIII.

The twenty-third assignment, discussed on pages 66 to 70 of the brief, is as follows:

> The court erred in not granting the defendant M. F. Ball a new trial on account of the newly discovered evidence of J. L. Keeler, the marriage license of C. S. Mayfield to Louisa Rodgers, and a certified copy of the record of the divorce proceedings of *Louisa Mayfield* vs. *C. S. Mayfield*, had in the district court of Cooke County, Texas, all of which fully appears in the record in this case, here referred to and made a part hereof; because said defendant M. F. Ball had no notice prior to the trial of this cause that the Government would introduce in evidence the marriage license of C. S. Mayfield and Lucy O. Box, the wife of said defendant, and in that way attempt to show that said defendant M. F. Ball was not legally married to Lucy O. Box, alias Mayfield, a Chickasaw Indian woman, and thereby establish the fact that this court had jurisdiction to try said M. F. Ball, and because said newly discovered evidence showed conclusively that said M. F. Ball was lawfully married to said Lucy O. Box, alias Mayfield, and the deceased being a member of the Chickasaw tribe of Indians, this court did not have jurisdiction to try the said M. F. Ball for murdering said deceased. (Rec., p. 150.)

It is no ground for reversal that error was committed in refusing a motion for a new trial. (*Arkansas Valley Land and Cattle Co.* v. *Mann*, 130 U. S., 69; *Bullitt County* v. *Washer*, *id.*, 142; *Missouri P. R. R. Co.* v. *Chicago and A. R. R. Co.*, 137 U. S., 60; *Fitzgerald and M. Constr. Co.* v. *Fitzgerald*, *id.*, 98; *Ayers* v. *Watson*,

id., 584; *Van Stone* v. *Stillwell and B. Mufg. Co.*, 142 U. S., 128; *Holder* v. *United States*, 150 U. S., 91; *Blitz* v. *United States*, 153 U. S., 308.)

This case is sought to be taken out of the rule on the ground that there was newly discovered evidence affecting the question of jurisdiction of the court, and that the question of jurisdiction is always open to be inquired into by this court.

It is true that the law is well settled that this court has power to inquire with regard to the jurisdiction of the inferior court, either in respect of the subject-matter or the person, even if such inquiry involved an examination of facts outside of but not inconsistent with the record. (*In re* Mayfield, 141 U. S., 116, and cases there cited.)

These were habeas corpus cases and were not like this, which is a proceeding to review the action of the trial court.

M. F. Ball pleaded to the jurisdiction, and the issues on this plea were submitted, with all the evidence adduced, to the jury, and the jury passed upon it under a proper charge, and the trial judge, upon a motion for a new trial, refused to set aside their verdict. It was an issue of fact. Ball had his day in court and a trial on this issue, and the case stands exactly as if he had undertaken to prove an alibi, or to raise a doubt as to his sanity or any other fact material to his defense, and the jury had found against him, and upon a motion for a new trial, setting up newly discovered evidence, the trial judge had overruled his motion. There is no more reason why he

should have a new trial before a jury, upon the issues raised by his plea to the jurisdiction, than upon any other issue.

If the trial judge thought that the newly discovered evidence was not material, or that proper diligence was not shown, or that for any other reason the motion should not be allowed, there is no reason why his action should not have the same weight in respect of these questions of fact as they would have in respect of other questions of fact which this court has uniformly refused to review.

The question here presented is entirely different from that in the case of *Smith* v. *United States* (151 U. S., 50, 55), in which the court held that there was no evidence offered by the Government that had a legitimate tendency to prove the jurisdictional facts.

ASSIGNMENT XXV.

This assignment is set out in the brief for plaintiffs in error (p. 70), but no effort is made to sustain it.

ASSIGNMENT XXVI.

The twenty-sixth assignment, discussed on pages 71 to 74 of the brief, is as follows:

> The defendant M. F. Ball has not been tried by due process of the law of the land in this: He was indicted, tried, convicted, and sentenced to death upon an indictment charging him, the said M. F. Ball, with being a principal offender in the killing and murdering of Wm. T. Box, when all of the evidence, which is made a part of the record in this case, here referred to and made a part hereof, shows conclusively that the said M. F. Ball was not present

> when the said Box was killed; that he, the said M. F. Ball, was doing no act at the time said Box was killed in furtherance of a common design of these defendants or anyone else to kill deceased; but the testimony shows conclusively that the said M. F. Ball, at the very time the shot was fired that killed deceased, was at a house a half a mile away, playing a fiddle for parties at a dance; and said testimony shows that the said defendant, M. F. Ball, was not a principal offender in the killing of said Box, but if guilty of any offense he was guilty as an accessory to said killing. (Rec., pp. 151, 152.)

On page 72 of the brief occurs the following:

> It was the intention of the Solicitor-General and counsel for plaintiffs in error to have incorporated in the printed record all the evidence that tended to connect M. F. Ball with the murder of Box.

There is nothing in the stipulation showing any intention as above set out. The stipulation shows that the Government introduced testimony "tending to sustain all of the averments in the indictment and all of the facts necessary for conviction, except plaintiffs in error *claim* the evidence showed M. F. Ball to be an accessory and not a principal." (Rec., p. 155.)

The jury found against this claim, and their finding is conclusive, since there was "testimony tending to sustain all of the averments in the indictment and all of the facts necessary for conviction." The quantum of evidence will not be considered, and the finding of the jury will not be disturbed, since there was evidence to sustain it.

The judge charged the jury as follows:

> If three parties have agreed to rob a store, one goes into a store for the purpose of committing the

actual robbery, another party is stationed 2 blocks away to keep watch, another in another direction, 2 blocks away, to keep watch. If the 3 parties have agreed upon the commission of the offense, and at the time the offense was committed each party was doing some act in furtherance of the carrying out of the purpose and common design, although not actually present at the time of the commission of the offense, he could be prosecuted and convicted as principal. In applying these principles to Filmore Ball, as to whether or not he is principal, if guilty at all, or whether accessory before the fact, depends upon what you believe from the evidence in this case.

If you believe from the testimony in this case that Filmore Ball, J. C. Ball, and R. E. Boutwell had previously agreed upon the killing of old man Box, and had agreed that R. E. Boutwell and J. C. Ball would go and kill him while the dance was going on, and that Filmore Ball would stay there and keep the crowd at the house for the purpose of concealing or preventing the parties from dispersing and coming in conflict with them or apprehending or hearing the shooting or things of that kind, and you believe that was a part of the agreement or understanding, in that event you are instructed that Filmore would be a principal as much as the others. But if you should believe from the testimony that he had encouraged, advised, or desired these parties to commit the offense, yet if you believe from the evidence that he was not acting in the common purpose or common understanding between the parties, although he might know they had gone for the purpose of killing old man Box, yet if at the time the act was done he was doing nothing that was a part of the scheme or understanding between the parties, he would not be a principal, but an accessory before the

fact, and could not be prosecuted and convicted under this indictment. (Rec., p. 130.)

If, to accomplish the purpose of killing, it was necessary to have the dancing go on to prevent interference, and if M. F. Ball was actively engaged in this part of the work, then he was as much a principal as those who made the assault, and his active participation at the time was a necessary factor in producing the result. He was near enough to aid, and was aiding.

The jury found these to be the facts, and there is no sound reason for saying that he was merely an accessory before the fact.

His active participation was a part of the *res gestæ*.

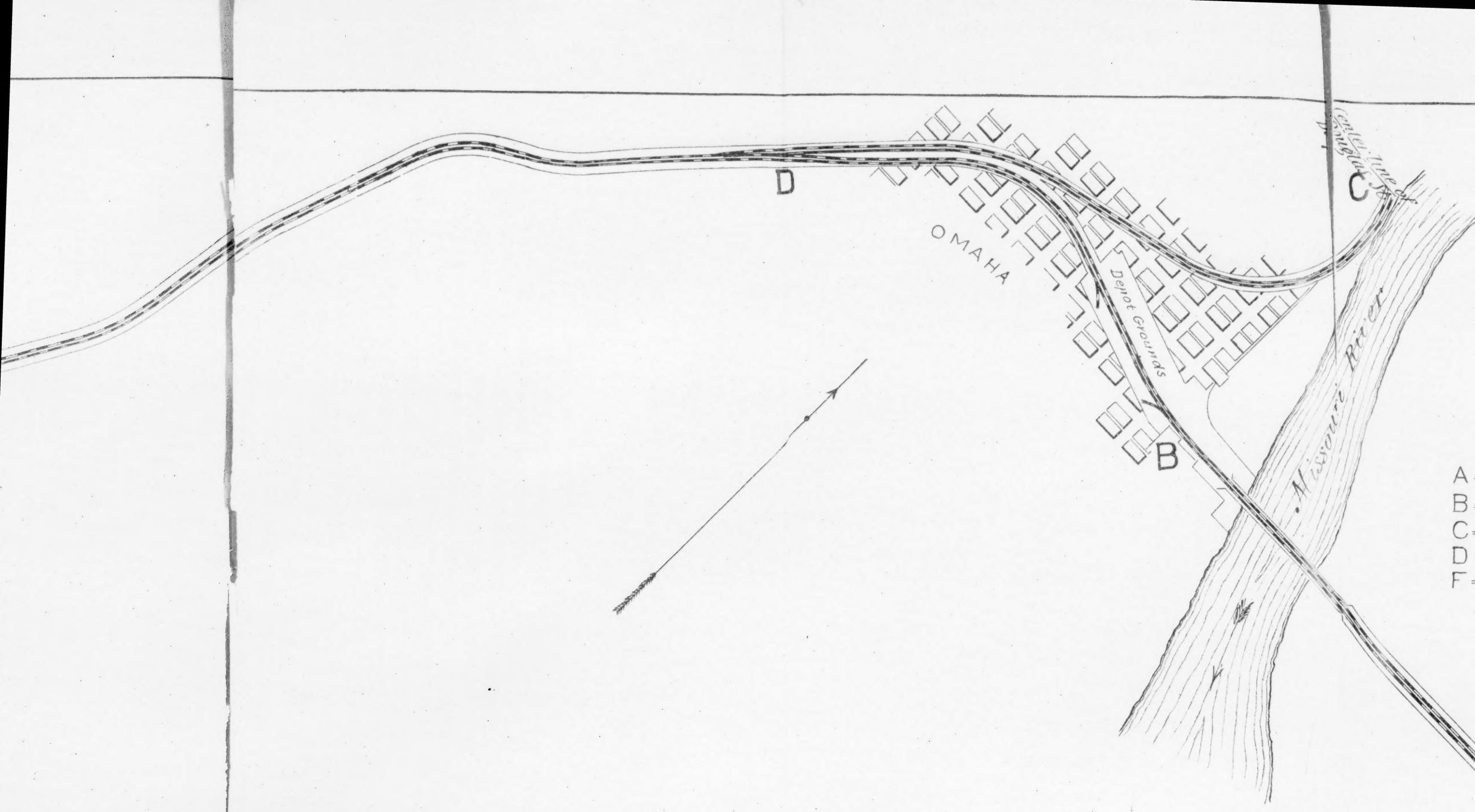
While presence is said to be necessary to make one a principal—

> the *presence* need not be a strict, actual, immediate presence, such a presence as would make him an eye or an ear witness of what passes, but may be a constructive presence. So that, if several persons set out together or in small parties upon one common design, be it murder or other felony or for any other purpose unlawful in itself, and *each takes the part assigned him—some to commit the fact, others to watch at proper distances and stations to prevent a surprise* or to favor, if need be the escape of those who are more immediately engaged—they are all, provided the fact be committed, in the eye of the law present at it; for it was made a common cause with them, *each man operated in his station at one and the same instant toward the same common end, and the part each man took tended to give countenance, encouragement, and protection to the whole gang and to insure the success of their common enterprise.* (1 Russell on Crimes, p. 27.)

The following were cases in which it was held that, though not actually present, parties might be principals if they were doing a part in the common transaction. *Rex* v. *Passey*, 7 Car. & P., 282; *Rex* v. *Harris*, 7 Car. & P., 416; *Breese* v. *The State*, 12 Ohio St., 146.

It is insisted for the Government that there is no error, and that the judgment should be affirmed.

J. M. DICKINSON,
Assistant Attorney-General.



E. C. Smeeds
Exhibit No 2

Sketch showing a part of the
Union Pacific Railway
between Council Bluffs Iowa and a point one and one
half miles beyond the Passenger Depot at South Omaha, Neb.

Chief Engineer's Office U. P. Ry.
Omaha, February 12th 1891

Prepared to accompany a valuation statement dated Feby 12th 1891.

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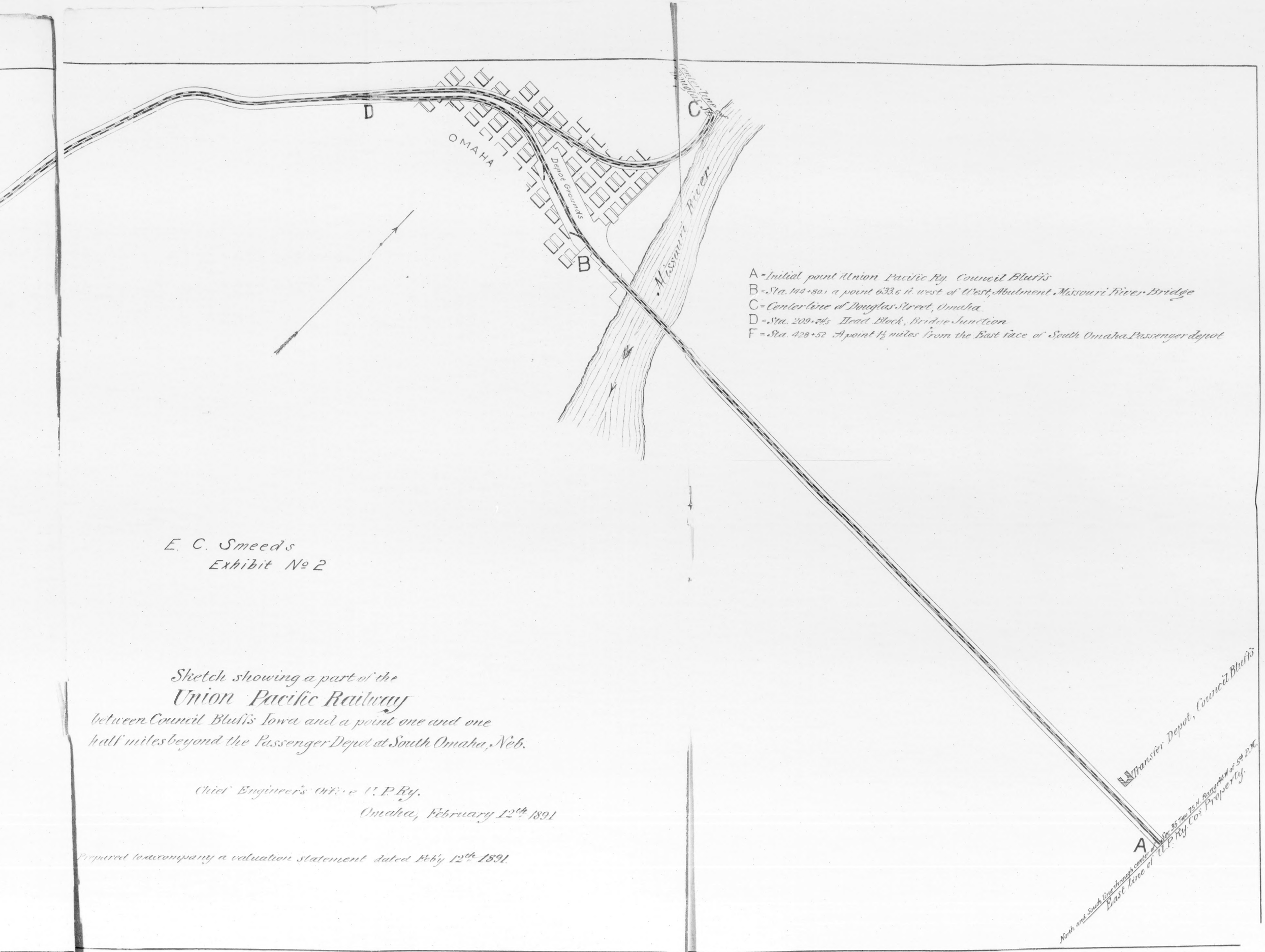
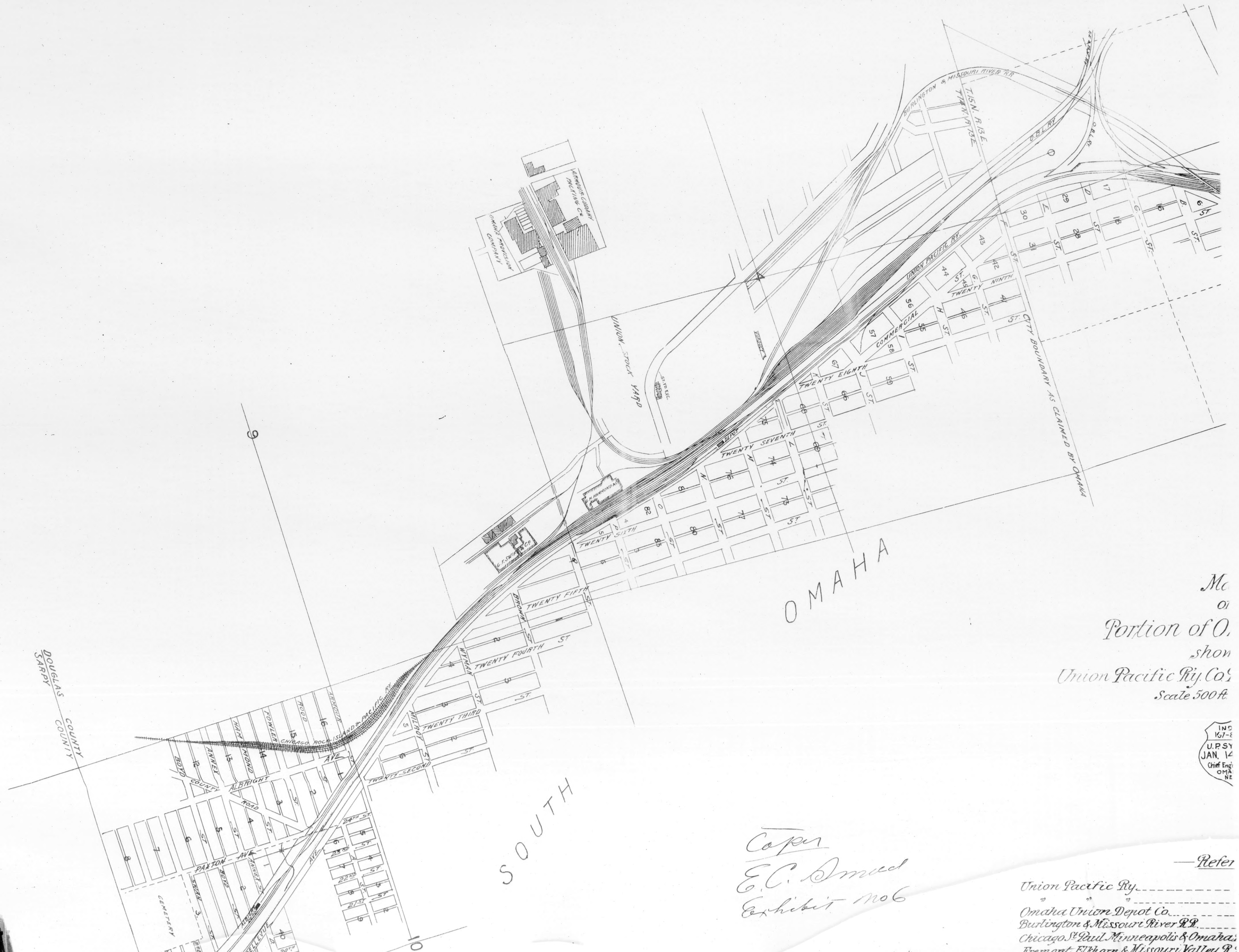


A = Initial point Union Pacific Ry. Council Bluffs
B = Sta. 144+80.1 a point 633.6 ft. west of West Abutment Missouri River Bridge
C = Center line of Douglas Street, Omaha
D = Sta. 209+94.5 Head Block, Bridge Junction
F = Sta. 428+52 A point ½ miles from the East face of South Omaha Passenger depot



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Fremont Elkhorn & Missouri Valley R.
Omaha Belt Line Ry.

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Burlington & Missouri River R.R.
Chicago St. Paul Minneapolis & Omaha Ry
Fremont Elkhorn & Missouri Valley R.R.
Omaha Belt Line Ry.
Chicago Rock-Island & Pacific Ry.
Union Stock Yard Tracks

Map of Portion of Omaha, Neb. showing Union Pacific Ry. Co Property, Tracks etc.

Scale 500 ft. to an inch.

OMAHA

CITY BOUNDARY AS CLAIMED BY OMAHA

CITY BOUNDARY AS CLAIMED BY SOUTH OMAHA

BURLINGTON & MISSOURI RIVER R.R.

T15N. R13E.

T14N. R13E.

U.P. RY.

B.&M.R.R.

OAK ST. DEPOT

LEASED TO W.C.B. T.L.E. & R.R. ASSN.

NORTH

BOULEVARD

GREEN ST.

SPRING

PEARL

OAK

ELM

MAPLE

LINN

WILCOX

FORREST

TWENTY FOURTH

TWENTY FIRST ST.

TWENTIETH

NINETEENTH

EIGHTEENTH

SEVENTEENTH

TWENTY EIGHTH

SEVENTH

COMMERCIAL

TWENTY NINTH

OLSEN'S ADD

CENTRE

HARTMAN'S ADD

GOV'T CORNR.

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JAN. 14-1891
Chief Eng'rs Office
OMAHA
NEB.

References

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" " " ——— proposed " ——— " ———
Omaha Union Depot Co. ——— " ——— " ———
Burlington & Missouri River R.R. ——— present ——— " ——— " ———
Chicago St. Paul Minneapolis & Omaha Ry. ——— " ——— " ———

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Map of Portion of Omaha, Neb. showing Union Pacific Ry. Co. Property, Tracks etc.

Scale 500 ft to an inch.

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References

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Omaha Union Depot Co.	" " "	
Burlington & Missouri River R.R.	present " " "	
Chicago St. Paul Minneapolis & Omaha Ry.	" " " "	
Fremont Elkhorn & Missouri Valley R.R.	" " " "	
Omaha Belt Line Ry.	" " " "	
Chicago Rock Island & Pacific Ry.	" " " "	
Union Stock Yard Tracks	" " " "	

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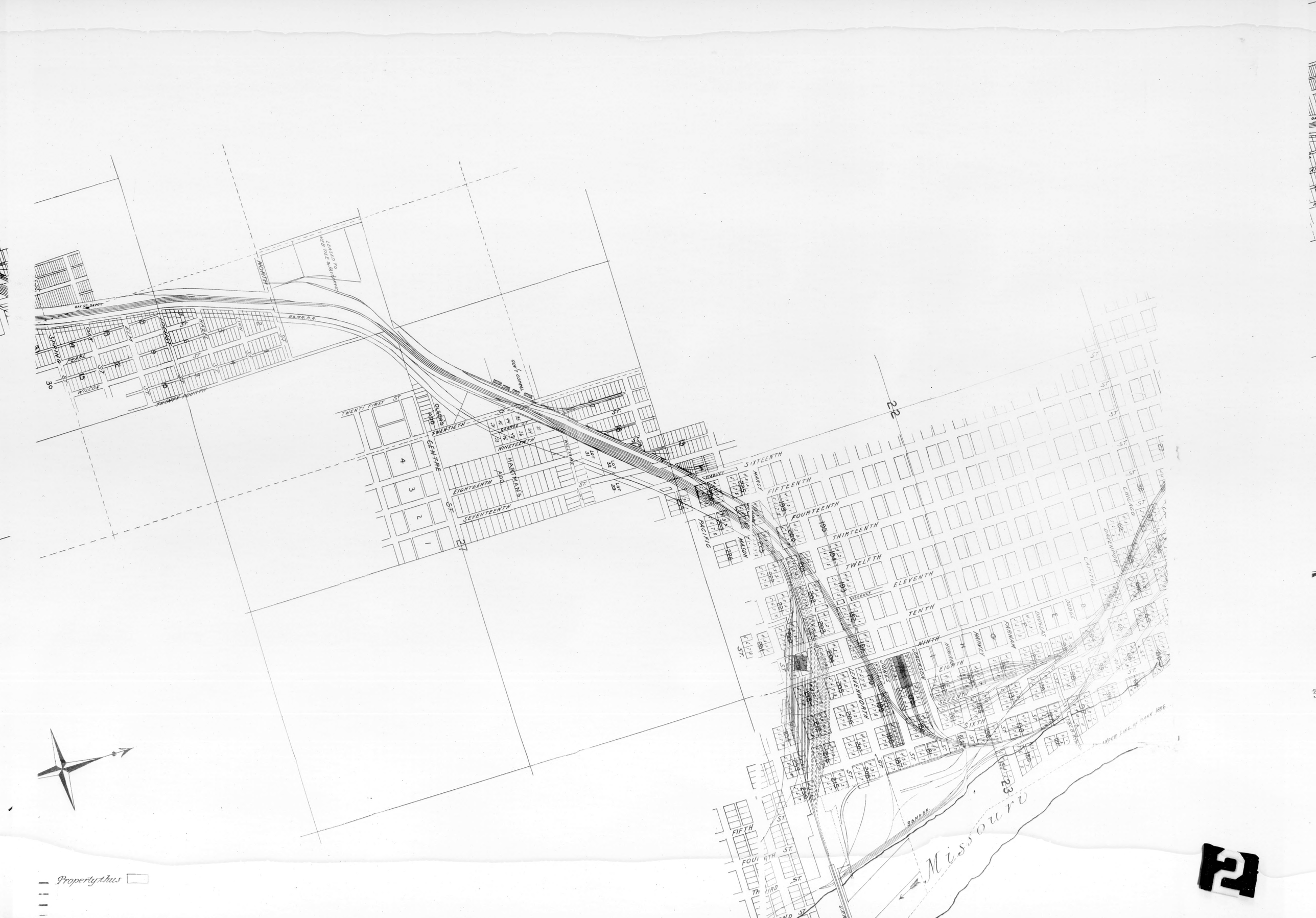
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HARTMAN'S ADD
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MARCY
HARNEY
JONES
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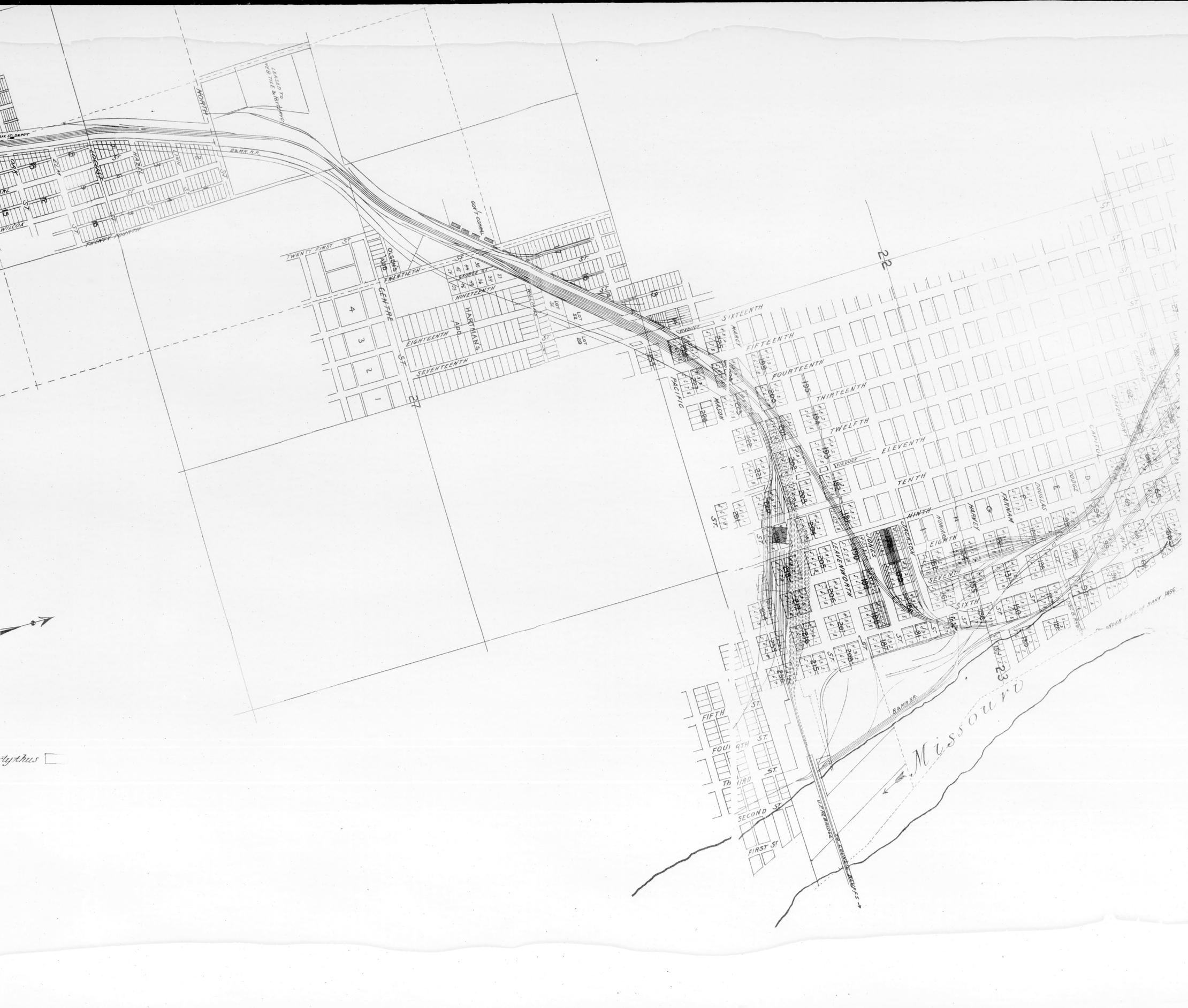
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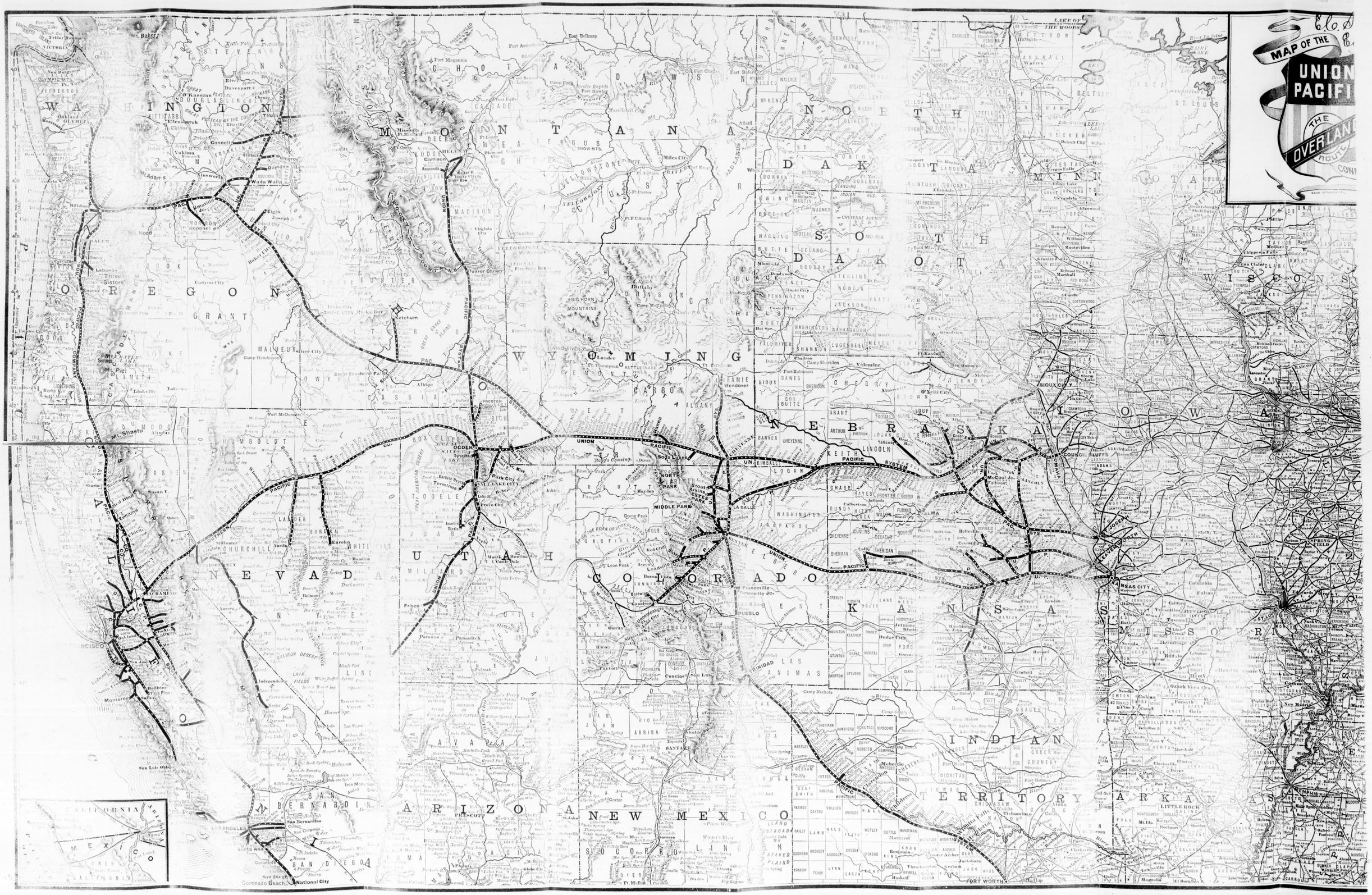
MAP OF THE
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THE OVERLAND ROUTE
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NEVADA
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MONTANA
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UTAH
COLORADO
ARIZONA
NEW MEXICO
NORTH DAKOTA
SOUTH DAKOTA
NEBRASKA
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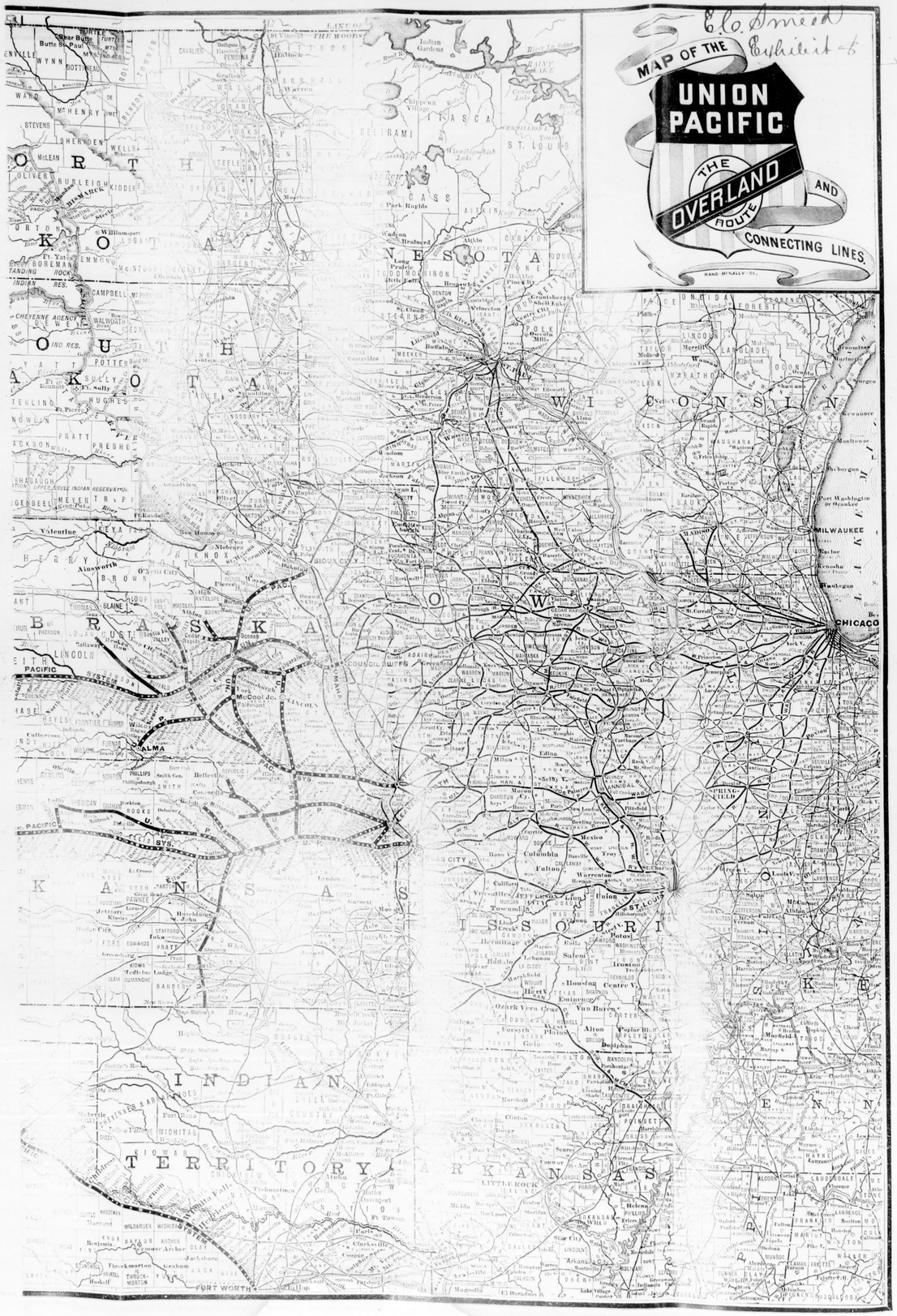

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Important Information.

COUPON TICKETS.

Each passenger must be provided with a ticket. In the event of a disagreement with conductors in regard to their rights, positions, privileges, etc., etc., passengers should recognize conductor's authority, taking receipt for amount of fare paid, and refer the matter to the Passenger Department for adjustment, as the conductor has no discretion, and is simply governed by rules he can not change. Through tickets to principal points reached via Union Pacific are on sale at all important railway stations in the United States and Canada, and passengers are allowed sufficient time to purchase or exchange tickets, check baggage, change cars, etc., after arrival at all trains at Kansas City and Council Bluffs Union Depots, previous to departure of Western trains. Servants holding second-class tickets, traveling with parties holding first-class tickets, can only be allowed the accommodations to which such tickets entitle them. Children under five years of age require no tickets; under twelve, half tickets; and twelve and over, full tickets, between all railway points and on Pacific Coast steamers. On trans-Pacific steamers, children under one year require no tickets; one to five years, quarter tickets; five to twelve years, half tickets; and twelve years or over, full tickets. On stage lines, children under three years require no tickets; over three and under twelve, half tickets; and twelve or over full tickets.

All tickets from Missouri River terminals, viz., Sioux City, Council Bluffs, Omaha, St. Joseph, Leavenworth, and Kansas City, to Laramie and points beyond, are good via Denver.

All tickets from Missouri River terminals, as mentioned above, **to Pocatello or points beyond, are good via Denver and Salt Lake City, at the option of the holder,** except that second-class tickets to Pocatello, or points north thereof, and as far west as Kimama, Idaho, will be honored via Granger and Pocatello only.

Holders of second-class tickets will be allowed stop-over of ten days, west of Pocatello, Idaho, in addition to regular limit. Second-class passengers are carried on the Express trains from Omaha or Kansas City to Portland, San Francisco, and Los Angeles. Ordinarily, cars can not be chartered for excursion purposes, but the exclusive use of a first-class tourist, Pullman, or excursion car, will be granted to parties holding fifteen full first-class tickets, $25.00, however, shall be the minimum charge for hauling such car.

BAGGAGE RATES.

The free baggage allowance is **150 Lbs.** on each full ticket, and **75 Lbs.** on each half ticket of any class, to all railroad points (including San Francisco and Pacific coast points), except between points in Nebraska, in which State the free baggage allowance is 300 pounds on full tickets, and 150 on half tickets. Baggage will be checked through to all points in the United States and Canada, to Union Pacific points (or beyond, including the Pacific Coast. The Union Pacific was the first line west of the Missouri River to inaugurate this system.

Passengers holding full first-class tickets, issued on steamship orders sold in foreign countries, for passage through the United States to foreign ports (in either direction), will be allowed 250 pounds of baggage free on each full ticket; and 125 pounds on each half ticket. The baggage allowance on stage lines is from 30 to 75 lbs., and the charge for extra weight is higher than for the same distance by rail.

Extra baggage, per lb., between all points on the Union Pacific, is 12 per cent. of the first-class fare.

Member of the family can pack their usual allowance of baggage in one or more trunks, provided no trunk exceeds 250 lbs., in weight.

Baggage belonging to bodies of second-class tickets will not be checked to any point short of the destination of the tickets they hold.

The extra baggage rate from Missouri River points in California is $3 per hundred pounds, on all classes of tickets.

GUNS, when unboxed, will be carried in baggage cars only, and no charge will be made for a distance of 100 miles or less. For distances over 100 miles, baggagemen may charge 25 cents for each passenger division. Cased guns will be checked free by baggagemen as part of the holder's baggage allowance, or passengers may carry them in coaches free.

FOR CARE OF DOGS, baggagemen will collect twenty-five cents per head for each division less than 100 miles, and for distances over 100 miles at the rate of one cent per mile.

BABY CARRIAGES, when accompanied by passengers with infants, may be checked as part of baggage allowance; over this compass, a charge only, but when they are accompanied they must be turned over to the express company.

BICYCLES AND TRICYCLES will be checked as part of the usual baggage allowance when accompanied by owners holding first-class tickets to local points.

FREIGHT RATES.

In effect March 1, 1891, subject to change without notice.

On household goods, from Sioux City, Omaha, Council Bluffs, St. Joseph, Leavenworth, or Kansas City, or any point in Nebraska or Kansas to Portland, Oregon, San Francisco, Los Angeles and other California common points, $200 per car of 20,000 pounds, including not to exceed 1,000 pounds of live stock, but in no case to include more than six head of horses. In less than car loads $2 50 per 100 lbs. At the above named rates shipments may be released by value of $5.00 per 100 pounds, in case of loss or damage, and so receipted for. Will pass one man in charge one way, if car contains live stock.

All freight charges must be prepaid.

From Sioux City, Omaha, Council Bluffs, St. Joseph, Leavenworth, or Kansas City to **Idaho** points as follows: Pocatello and all points North, South, and East, 62½ cents per 100 pounds in car-load lots. All points west of Pocatello (excepting those west of Caldwell), 75 cents per 100 pounds in car-load lots. All points west of Caldwell, $1.00 per car of 24,000 pounds; $1.25 per 100 pounds to Pocatello and points North, South, and East; $1.50 per 100 pounds to all points west of Pocatello except those west of Caldwell; and $2.00 per 100 pounds to all points west of Caldwell in less than car lots.

Montana—To all points on main line, 62½ cents per 100 pounds; and $1.25 per 100 pounds less than car-load lots. *All shipments of car-load lots must be of 20,000 pounds minimum*, and will be relegated to lots of $5 per 100 pounds, and trunks especially sold and be taken as freight as received from baggage agent.

Emigrant movables, property of intending settlers only (household goods, released to valuation of $2.00 per pound), in car-load lots or less, and so declared on shipping ticket or bill of lading by shipper, passed and guaranteed.

The term "*Emigrant movables*" applies to household goods, machinery and wagons owned and used by settlers, but does not include merchandise, live stock (except work animals, when billed from Coast term. nals), trees and shrubbery, lumber and shingles (not in the aggregate to the quantity of 2,000 feet of lumber, and not to exceed 250 in numbers, or a portable house), and property included in lots of intending settlers, but does *not include* dressed meat, such lots of grain unless intended for seed, or for feeding animals while in general movables, or any articles intended for sale or speculation.

Ten head of live stock, in the aggregate, and a reasonable amount of household goods, or parts on the line of the Union Pacific. Our special stock facilities will be given to settlers moving on the line of a car of household goods which contains five stock, but not *only* on the train to which such car is attached. The rate is the lowest obtainable, and if presented by any other person than the one entitled thereto, it will be taken up and collected at full fare.

STEAMSHIPS.

For China, Japan and India.—Steamships of the Oriental Steamship Company and Messageries Maritimes, sail from San Francisco for Japan and China, on the 4th, 14th and 25th.

For Australia, New Zealand and Sandwich Islands—Steamships of the Oceanic Steamship Co. sail from San Francisco, Auckland and Sydney, March 17th, April 9th, May 4th.

For Alaska.—Steamships of the Union Pacific System sail for Puget Sound, connecting with Steamships for Victoria, B. C., 15th and 30th, April 15th and 30th, and May 15th, for Tacoma and Seattle by Union Pacific steamships from Tacoma, Victoria, and Port Townsend, B. C., and for Alaska connecting with the Alaska steamships which leave Pt. Townsend March 3d and 18th, and April 2d and 18th.

For Astoria. Steamer R. R. Thompson leaves Portland except Sunday at 8 00 p. m. Steamer Telephone leaves Ash St. dock at 7.00 a. m. Steamer R. R. Thompson leaves Ash St. Steamer Telephone leaves Alder Street Wharf.

For the Cascades.—Steamers of the Union Pacific System leave Portland for the Cascades daily except Sunday at 8 00 a. m. and 4.00 p. m. Steamer leaves Cascades for Portland daily except Sunday at 7.30 a. m. All tickets are good either via the Cascades and Portland.

For San Francisco. Steamships of the Union Pacific System leave Portland for San Francisco March 9th, and every four days thereafter.

For Portland. Steamships of the Union Pacific System leave San Francisco March 5th, and every four days thereafter.

PULLMAN SLEEPING CARS.

Pullman's Palace Car Co. now operates this class of service.

PULLMAN PALACE CAR RATES BETWEEN

New York and Chicago	$
New York and St. Louis	
Boston and Chicago	
Chicago and Omaha or Kansas City	
Chicago and Denver	
St. Louis and Kansas City	
St. Louis and Denver	
Council Bluffs, Omaha or Kansas City and Denver	
Council Bluffs, Omaha or Kansas City and Ogden	
Council Bluffs, Omaha or Kansas City and Salt Lake City	
Council Bluffs, Omaha or Kansas City and Portland	
Council Bluffs, Omaha or Kansas City and Butte	
Council Bluffs, Omaha or Kansas City and San Francisco	
Chicago, Omaha or Kansas City and San Francisco or Los Angeles	
Denver and Ogden	
Denver and Salt Lake City	
Denver and Portland	
Pocatello and Butte	

For a Section, Twice the Double Berth Rates will be charged.

The Private Hotel, Dining, Hunting and Smoking Cars of the Pullman Company will accommodate both Line Departure, allowing a full bed to rest and are fitted with such modern conveniences as private, observation and smoking rooms, barber shop, bath room, buffet, and library. They are called *"Hotel and the Hunt"* for tourists, theatrical companies, sportsmen, and private parties. The Hotel Cars have special conveniences, and are provided with dog kennels, gun-racks, fishing tackle, etc. These cars can be chartered at following rates per diem (24 hours' time being reckoned from date of departure until returned same, unless otherwise arranged with the Pullman Company):

24

IMPORTANT INFORMATION—Continued.

car-load lots. All points west of Caldwell $75.00 per car of 24,000 pounds; $1.25 per 100 pounds to Pocatello and points North, South, and East; $1.50 per 100 pounds to all points west of Pocatello except those west of Caldwell; and $2.00 per 100 pounds to all points west of Caldwell in less than car lots.

Montana—To all points on main line, 62½ cents per 100 pounds; and $1.25 per 100 pounds less than car-load lots. *All shipments of car-load lots must be of 20,000 pounds minimum*, and will be relegated to lots of $5 per 100 pounds, and trunks especially sold and be taken as freight as received from baggage agent.

Emigrant movables, property of intending settlers only (household goods, released to valuation of $2.00 per pound), in car-load lots or less, and so declared on shipping ticket or bill of lading by shipper, passed and guaranteed.

The term "*Emigrant movables*" applies to household goods, machinery and wagons owned and used by settlers, but does not include merchandise, live stock (except work animals, when billed from Coast term. nals), trees and shrubbery, lumber and shingles (not in the aggregate to the quantity of 2,000 feet of lumber, and not to exceed 250 in numbers, or a portable house), and property included in lots of intending settlers, but does *not include* dressed meat, such lots of grain unless intended for seed, or for feeding animals while in general movables, or any articles intended for sale or speculation.

Ten head of live stock, in the aggregate, and a reasonable amount of household goods, or parts on the line of the Union Pacific. Our special stock facilities will be given to settlers moving on the line of a car of household goods which contains five stock, but not *only* on the train to which such car is attached. The rate is the lowest obtainable, and if presented by any other person than the one entitled thereto, it will be taken up and collected at full fare.

STEAMSHIPS.

For China, Japan and India.—Steamships of the Oriental Steamship Company and Messageries Maritimes, sail from San Francisco for Japan and China, on the 4th, 14th and 25th.

For Australia, New Zealand and Sandwich Islands—Steamships of the Oceanic Steamship Co. sail from San Francisco, Auckland and Sydney, March 17th, April 9th, May 4th.

For Alaska.—Steamships of the Union Pacific System sail for Puget Sound, connecting with Steamships for Victoria, B. C., 15th and 30th, April 15th and 30th, and May 15th, for Tacoma and Seattle by Union Pacific steamships from Tacoma, Victoria, and Port Townsend, B. C., and for Alaska connecting with the Alaska steamships which leave Pt. Townsend March 3d and 18th, and April 2d and 18th.

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For Portland. Steamships of the Union Pacific System leave San Francisco March 5th, and every four days thereafter.

PULLMAN SLEEPING CARS.

Pullman's Palace Car Co. now operates this class of service.

PULLMAN PALACE CAR RATES BETWEEN

New York and Chicago	$
New York and St. Louis	
Boston and Chicago	
Chicago and Omaha or Kansas City	
Chicago and Denver	
St. Louis and Kansas City	
St. Louis and Denver	
Council Bluffs, Omaha or Kansas City and Denver	
Council Bluffs, Omaha or Kansas City and Ogden	
Council Bluffs, Omaha or Kansas City and Salt Lake City	
Council Bluffs, Omaha or Kansas City and Portland	
Council Bluffs, Omaha or Kansas City and Butte	
Council Bluffs, Omaha or Kansas City and San Francisco	
Chicago, Omaha or Kansas City and San Francisco or Los Angeles	
Denver and Ogden	
Denver and Salt Lake City	
Denver and Portland	
Pocatello and Butte	

For a Section, Twice the Double Berth Rates will be charged.

The Private Hotel, Dining, Hunting and Smoking Cars of the Pullman Company will accommodate both Line Departure, allowing a full bed to rest and are fitted with such modern conveniences as private, observation and smoking rooms, barber shop, bath room, buffet, and library. They are called *"Hotel and the Hunt"* for tourists, theatrical companies, sportsmen, and private parties. The Hotel Cars have special conveniences, and are provided with dog kennels, gun-racks, fishing tackle, etc. These cars can be chartered at following rates per diem (24 hours' time being reckoned from date of departure until returned same, unless otherwise arranged with the Pullman Company):

25

IMPORTANT INFORMATION—Continued.

Less than Ten Days.

per diem.

Hotel Cars	$ 50.00
Buffet Cars	40.00
Sleeping Cars	30.00
Dining Cars	30.00

Ten Days or over, $5.00 per day less than above. Hotel, Sleeping and Dining Cars are furnished only on trains that run between points where extra cars are furnished cars to be hauled or detached.

Where berth rate is $2.50, car rate will be $25.00
" " 2.00, " " " 20.00
" " 1.50, " " " 15.00

For each additional berth rate of 50 cents, car rate will be increased $5.00.

Above rates include services of polite and skillful attendant; commissariat will also be furnished if desired. Such chartered cars contain no less than 15 persons holding full first-class tickets, and full fare ticket will be required for each additional person. Cars chartered "per diem" cars are given up *en route*, chartering party arranges for return to original starting point free, or pay amount necessary for return thereto. Diagrams showing interior of these to be had of any agent of the Company.

PULLMAN COLONIST SLEEPERS

are now running between Council Bluffs or Omaha, and Portland, San Francisco without change, also between Kansas City and Portland without change, making connection at Cheyenne with similar cars for Chicago. These cars are fitted up complete with Pullman bedding, blankets, pillows, etc., requiring nothing to be furnished by the passenger. Experience has proved that the patronage of these cars, who are required to keep them in good order, and look after the wants and comfort of passengers, is large, and the rates so low that they are popular with economical and comfortable as first class Pullman Sleepers. A charge of $1.00 for a berth will be made from Council Bluffs or Omaha, Council Bluffs, Omaha or Kansas City and San Francisco, or Portland; $4 between Chicago, San Francisco and Portland; $3 between Chicago and Portland. Passengers holding either first or second-class tickets will be allowed to ride in these cars. **No smoking allowed in these cars.** Apply to nearest agent for time in detail, through, R. W. CRAWFORD, Passenger Agent, Transfer Depot, Council Bluffs, Ia., or Room 5, 504 Kearney Street, San Francisco, or Kansas City, Mo.

The exclusive use of one of these cars will be accorded a party holding fifteen first-class tickets, and the charge will be $25.00 each for full capacity of car or at per diem rate of fifteen dollars from time car leaves home station until returned to same.

FREE BERTHS,

to passengers furnishing their own bedding, are given in second-class sleepers. Apply to agents, or to R. W. CRAWFORD, Council Bluffs, Ia., City and Portland Ticket Office, 134 Second Street, Portland, Or.

Sleepers, apply to R. W. CRAWFORD, Passenger Agent, U. P. System, Council Bluffs, Ia., or 504 Kearney Street, San Francisco, or Kansas City, Mo.

MEALS.

All trains, except those specified above under head of Parlor Cars, carry regular dining cars, which are run between the Missouri River and Ogden under the direct supervision of their company, by the Pacific Hotel Company, and between Ogden and San Francisco by the Central Pacific Railroad Company.

BUFFET SERVICE.

Particular attention is called to the fine Buffet Service on the Union Pacific System in connection with Pullman Palace Parlor Cars on trains to which no additional charge is attached.

Pullman Dining Car Service

ON THE UNION PACIFIC SYSTEM

One of the important questions considered by travelers is the change to meals. The particular attention of the traveling public is called to the elegant Pullman Dining Cars now in operation on the Union Pacific.

The service between Kansas City and Denver, on the fast Express Denver Vestibuled Limited, together with the service between Council Bluffs, Omaha, and Denver, on trains Nos. 5 and 6, "The Overland Limited," and between Council Bluffs, Omaha and Council Bluffs, Omaha and Chicago, on trains Nos. 1 and 2, "The Overland Flyer," makes the Union Pacific the most prominent Dining Car Line west of the Missouri River. Meals not surpassed by any first-class hotel, are served at the low price of 75c. each.

26

UNION PACIFIC — THE OVERLAND ROUTE — UNION PACIFIC

SALT LAKE CITY THROUGH LINES.

Read Down					March, 1891. STATIONS.		Read Up		
Exp. A No. 1.	Exp. A No. 3.	Exp. A No. 5.	Pass. Mls.	Mls.		Exp. A No. 6.	Exp. A No. 4.	Exp. A No. 2.	
P. M.	P. M.	P. M.			Salt Lake City to San Francisco.			A. M.	
8 00	3 30			0	Lv.... Salt Lake City ...Ar.	4250		10 50	
8 00	6 00				....Ogden....	4301		9 30	
8 10	2 50	1		781	....Sacramento....	39		11 00	
12 15	6 45	547		87	Ar.... San Francisco ...Lv.	52		7 00	
Exp. A No. 1.	Exp. A No. 3.				SALT LAKE CITY TO LOS ANGELES.			Exp. A No. 2.	
8 00				0	Lv.... Salt Lake City ...Ar.	4250		10 50	
8 00					....Ogden....	4301		9 30	
8 10		547		781	....Sacramento....	39		11 00	
7 25		2 45		420	Ar.... Los Angeles ...Lv.	293		10 40	
Exp. A No. 1.					SALT LAKE CITY TO PORTLAND.			Exp. A No. 2.	
8 00				0	Lv.... Salt Lake City ...Ar.	4250		5 10	
9 50				96	....Ogden....	4301		3 50	
5 40				196	....Pocatello	4405		7 30	
8 20				284	....Shoshone	4493		4 50	
11 50				350	....Glenn's Ferry....	4561		11 10	
2 02				425	....Nampa	4637		7 48	
3 50				487	....Huntington	4699		6 20	
7 58				656	....La Grande	4786		11 45	
11 55		1		751	....Pendleton	4881		7 50	
1 10		245		795	....Umatilla Junc	300		8 30	
9 00				962	Ar.... Portland .... Lv.	9		9 00	
Exp. A No. 1.					SALT LAKE CITY TO HELENA.			Exp. A No. 2.	
8 00				0	Lv.... Salt Lake City ...Ar.	4250		10 50	
9 50				97	....Ogden....	4301		3 50	
4 00				196	....Pocatello	4405		7 30	
7 00				396	....Limia....	4605		4 30	
5 00				448	....Silver Bow	4657		7 50	
7 45	5 30			545	....BUTTE	5482		7 00	
11 00		1		707	Ar.... Helena .... Lv.	4365		3 45	
8 20					Lv.... Silver Bow ...Ar.	5042	11 50	10 24	
10 05				498	....Garrison	4728	10 20	8 50	
12 20				637	Ar.... Helena .... Lv.	4365	9 00	7 10	
Ex Flyer Atl. Exp. No. 3.					SALT LAKE CITY TO COUNCIL BLUFFS.			Pac. Exp. No. 1.	Ex Flyer No. 5.
5 00	3 30			0	Lv.... Salt Lake City ...Ar.	4250		5 10	5 45
8 30	5 20			97	....Ogden....	4301		3 50	4 45
11 20	8 45			396	....Evanston	4605		7 30	1 30
3 00	11 30			593	....Granger	6278		8 30	6 30
4 40	1 00			656	....Green River	6339		6 50	8 00
9 45	7 15			809	....Rawlins	6741		10 40	3 10
2 45	1 10			1020	....Laramie	7149		6 50	10 05
5 30	4 00			1178	....Cheyenne	6056		3 40	7 30
12 35	12 30			1311	....North Platte	2796		5 40	10 45
4 20	5 45			1477	....Grand Island	1855		9 00	2 15
6 15	8 15			1591	....Columbus	1442		11 20	5 55
.....	1 10			1737	....Sioux City	1		6 50	.....
	10 12			1683	....Valley			6 00	
9 05	.....			1808	....Omaha	1057		7 30	2 50
9 30	12 05			1812	....Council Bluffs	1057		8 00	2 50
Ex Flyer Atl. Exp. No. 3.					SALT LAKE CITY TO KANSAS CITY.			Pac. Exp. No. 1.	Ex Flyer No. 5.
5 00	3 30			0	Lv.... Salt Lake City ...Ar.	4250		5 10	5 45
8 30	5 20			97	....Ogden....	4301		3 50	4 45
11 20	8 45			396	....Evanston	4605		7 30	1 30
3 00	11 30			593	....Granger	6278		8 30	6 30
4 40	1 00			656	....Green River	6339		6 50	8 00
9 45	7 15			809	....Rawlins	6741		10 40	3 10
2 45	1 10			1020	....Laramie	7149		6 50	10 05
5 30	4 00			1178	....Cheyenne	6056		3 40	7 30
12 35	12 30			1311	....North Platte	2796		5 40	10 45
4 20	5 45			1477	....Grand Island	1855		9 00	2 15
6 15	8 15			1591	....Columbus	1442		11 20	5 55
.....	1 10			1737	....Sioux City	1		6 50	.....
	10 12			1683	....Valley			6 00	
9 05	.....			1808	....Omaha	1057		7 30	2 50
9 30	12 05			1812	....Council Bluffs	1057		8 00	2 50
Ex Flyer Atl. Exp. No. 3.					SALT LAKE CITY TO KANSAS CITY.			Pac. Exp. No. 1.	Ex Flyer No. 5.
5 00	3 30			0	Lv.... Salt Lake City ...Ar.	4250		5 10	5 45
8 30	5 20			97	....Ogden....	4301		3 50	4 45
11 20	8 45			396	....Evanston	4605		7 30	1 30
3 00	11 30			593	....Granger	6278		8 30	6 30
4 40	1 00			656	....Green River	6339		6 50	8 00
9 45	7 15			809	....Rawlins	6741		10 40	3 10
2 45	1 10			1020	....Laramie	7149		6 50	10 05
5 30	4 00			1178	....Cheyenne	6056		3 40	7 30
12 35	12 30			1311	....La Salle	4863		11 10	3 01
4 20	5 45				Lv.			9 00	2 15
6 15	8 10			1688	....Denver	5270		7 30	6 30
12 19	11 15			1744	....Brigg....	5027		6 30	5 06
12 45	1 55			855	....Cheyenne Wells	4276		1 30	1255
3 52	5 04			1026	....WALLACE	3896		11 58	9 17
8 35	7 30			1095	....Ellis....	3658		8 10	7 17
12 20	11 00			1159	....Salina	1305		5 05	3 05
4 20	12 30			1179	....Junction City	1161		3 40	1 40
4 40	2 45			1237	....Topeka	881		12 55	11 45
8 55	3 40			1295	....Lawrence	1		12 10	11 00
9 45	6 30			1320	Ar.... Leavenworth ...Lv.	762		10 25	4 50
7 20	5 00			1295	....Kansas City	1		10 45	9 20

2 Meals. A Daily. P. M. Time and Junction Points Bold Faced Type.

27

DENVER THROUGH LINES.

Read Down					March, 1891. DENVER, OGDEN & SALT LAKE LINE.		Read Up		
Exp. A No. 1.	Exp. A No. 7.	Mls.				Exp. A No. 8.	Exp. A No. 2.	
12 30	9 35	0	Lv..	Denver	Ar.	5280	7 55	8 15
5 20	3 40	107	....	Cheyenne	....	6056	4 05	5 25
10 05	6 50	163	....	Laramie	....	7149	1 10	2 45
3 10	12 40	299	....	Rawlins	....	6741	7 15	9 45
8 50	7 50	431	....	Green River	....	6057	7 00	4 40
....	8 20	496	....	Granger	....	6278	11 30	3 00
12 45	11 50	546	....	Evanston	....	6598	8 45	12 20
4 15	3 50	615	....	Ogden	....	4301	5 10	8 30
5 35	5 10	658	Ar.	Salt Lake	Lv.	4250	3 50	7 00

Exp. A No. 1.	Exp. A No. 7.				DENVER & SAN FRANCISCO LINE.		Exp. A No. 8.	Exp. A No. 2.
12 30	9 35	0	Lv..	Denver	Ar.	5280	7 55	8 15
5 20	3 40	107	....	Cheyenne	....	6056	4 05	5 25
10 05	6 50	163	....	Laramie	....	7149	1 10	2 45
3 10	12 40	299	....	Rawlins	....	6741	7 15	9 45
8 50	7 50	431	....	Green River	....	6057	7 00	4 40
....	8 20	496	....	Granger	....	6278	11 30	3 00
12 45	11 50	546	....	Evanston	....	6598	8 45	12 20
3 00	6 00	621	....	Ogden	....	4301	5 20	8 30
8 35	2 20	780	....	Sacramento	....	39	....	11 00
12 15	6 00	1455	Ar.	San Francisco.	Lv.	14	....	7 00

Exp. A No. 1.	Exp. A No. 7.				DENVER & PORTLAND LINE.		Exp. A No. 8.	Exp. A No. 2.
12 30	9 35	0	Lv..	Denver	Ar.	5280	7 55	8 15
5 20	3 40	107	....	Cheyenne	....	6056	4 05	5 25
10 05	6 50	163	....	Laramie	....	7149	1 10	2 45
3 10	12 40	299	....	Rawlins	....	6741	7 15	9 45
9 00	6 35	431	....	Green River	....	6057	....	4 40
....	....	496	Ar.	Granger	Lv.	6278	....	2 50
5 40	....	681	....	Pocatello	....	4405	....	6 05
9 20	....	788	....	Shoshone	....	3926	....	2 45
3 50	....	895	....	Huntington	....	4699	....	4 10
11 15	....	1181	Ar.	Pendleton	Lv.	4881	....	7 45
8 20	....	1402	Ar.	Spokane Falls	Lv.	....	....	8 45
1 40	....	1225	....	Umatilla Junction	....	300	....	5 50
9 00	....	1411	Ar.	Portland	Lv.	9	....	9 00

Exp. A No. 1.	Exp. A No. 7.				DENVER & HELENA LINE.		Exp. A No. 8.	Exp. A No. 2.
12 30	9 35	0	Lv..	Denver	Ar.	5280	7 55	8 15
5 40	7 20	107	....	Cheyenne	....	6056	4 05	5 25
10 05	10 05	163	....	Laramie	....	7149	1 10	2 45
12 40	3 10	299	....	Rawlins	....	6741	7 15	9 45
7 15	9 00	431	....	Green River	....	6057	1 10	4 40
....	7 00	496	Ar.	Granger	Lv.	6278	....	2 50
....	5 00	936	....	Silver Bow	....	5482	....	7 50
7 40	5 30	1016	Lv.	Butte	Lv.	5482	....	7 00
11 00	....	1016	Ar.	Helena	Lv.	....	....	3 45
8 19	....	936	Lv.	Silver Bow	Ar.	5042	11 50	6 35
10 05	....	1081	....	Garrison	....	4728	10 20	4 55
12 20	....	1031	Ar.	Helena	Lv.	4365	9 00	1 50

OREGON SHORT LINE AND UTAH NORTHERN RY. OGDEN TO SALT LAKE AND EUREKA.

Read Down					March, 1891. STATIONS.		Read Up		
Last Local Exp. Acc.	A Exp. Mail.	A Exp. Exp.	A Exp. Exp.	Pass. Mls.		Mls.	Pass. Exp.	A Exp. Exp.	A Mail.
P. M.	A. M.	A. M.	P. M.				A. M.	P. M.	P. M.
8 00	5 30	4 15	3 50	0	Lv.... Ogden	Ar.	8 30	3 30	8 45
6 35	10 05	4 28	4 16	....	....Kaysville....	....	8 10	4 15	8 45
6 46	10 16	4 36	4 26	....	....Woods Cross....	....	8 00	4 25	8 31
7 01	10 31	4 51	4 41	....	....Woods Cross....	....	7 39	3 49	8 15
7 17	10 47	5 07	4 57	....	....Becks Hot Springs....	....	7 23	3 33	8 01
7 30	10 50	5 35	5 10	36	Ar.... Salt Lake	Lv.	7 00	3 30	8 00
....	....	7 35	6 25	....	....Salt Lake	Lv.	5 00	....	5 30
....	....	7 48	6 38	....	....Francisco....	....	9 47	6 07	....
....	....	8 00	6 50	....	....Lehi Junction....	....	8 55	5 25	....
....	....	8 55	7 45	....	....Pleasant Grove....	....	8 00	4 38	....
....	....	9 05	8 00	92	Ar.... Provo	Lv.	7 50	4 30	....
....	....	9 20	8 15	102	....Springville....	....	7 35	4 14	....
....	....	9 36	7 00	92	....Spanish Fork....	....	7 00	4 04	....
....	....	10 22	8 18	99	....Nephi....	....	6 15	3 55	....
....	....	10 10	8 25	124	....Nephi....	....	5 03	2 35	....
....	....	12 10	9 00	....	Lv.... Juab	Lv.	....	1 10	....
....	....	12 30	....	98	Ar.... Juab	Lv.	....	1 00	....
....	....	4 00	....	....	Lv.... Juab	Lv.	....	9 30	....
....	....	8 30	....	125	Ar.... Milford	Ar.	....	5 00	....
....	....	....	....	....	....Frisco....	....	....	....	6 15
....	....	....	....	125	Ar.... Frisco	Lv.	....	....	5 00

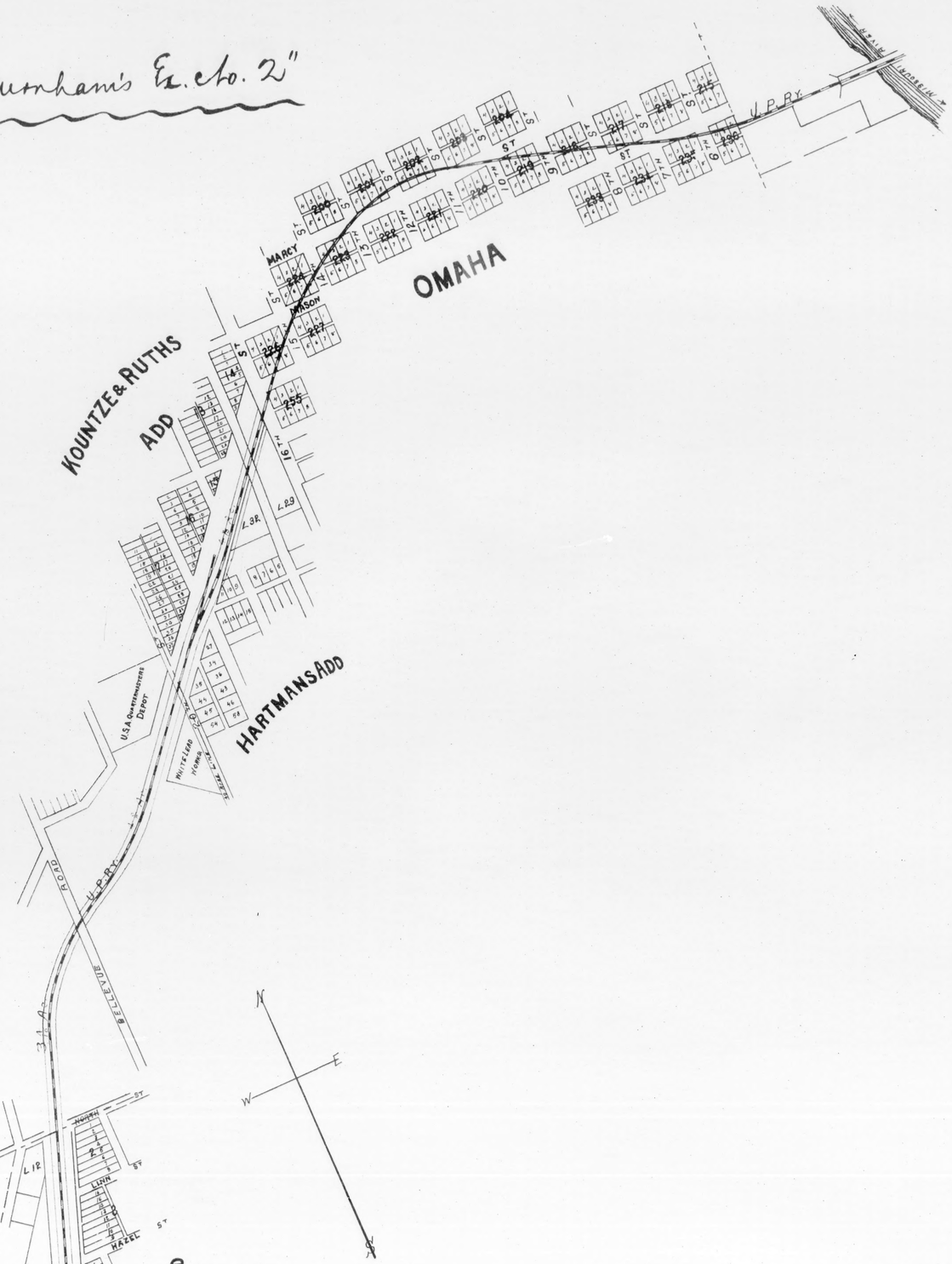
P. M. Time and Junction Points Bold Faced Type. * Stop on Signal. A Meals.

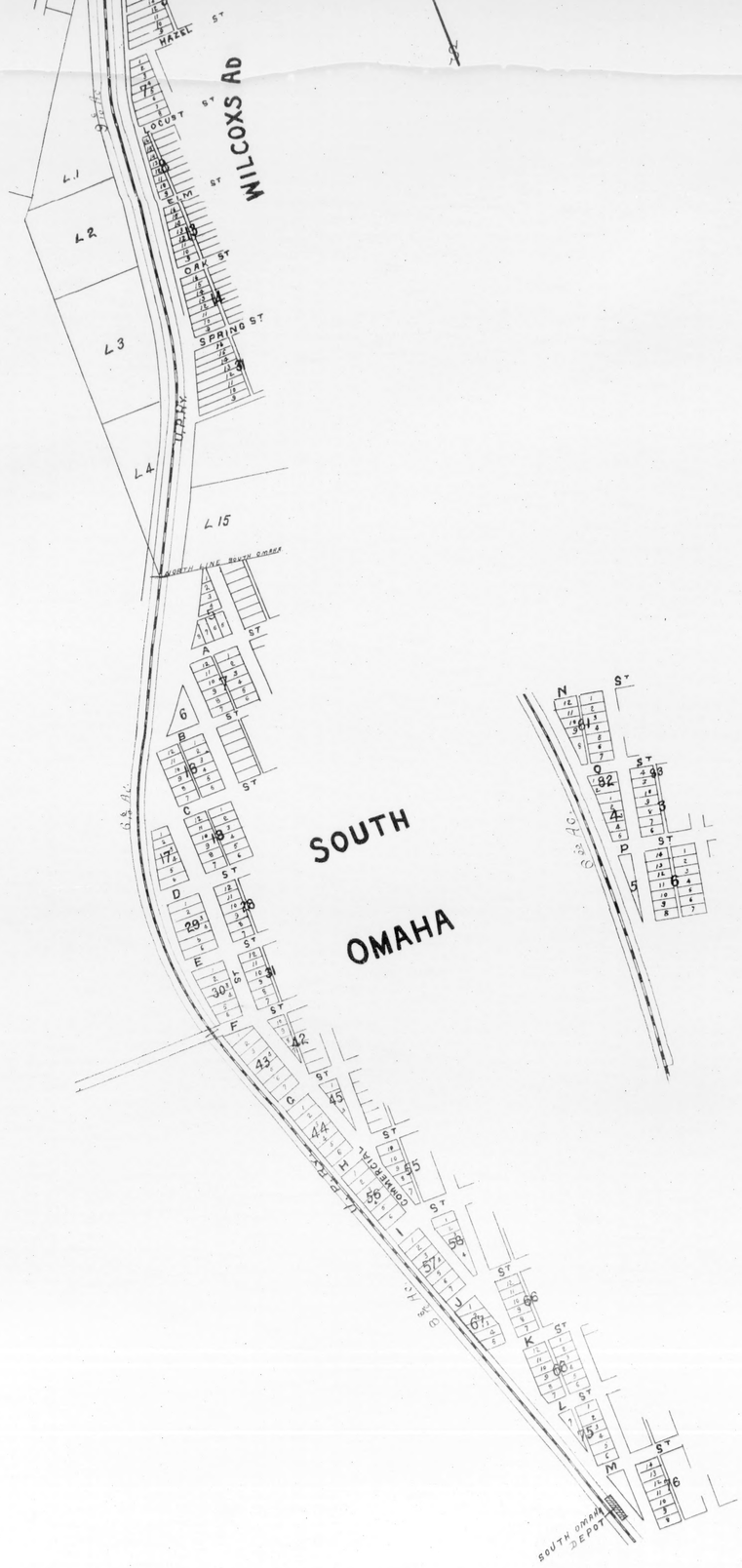
28

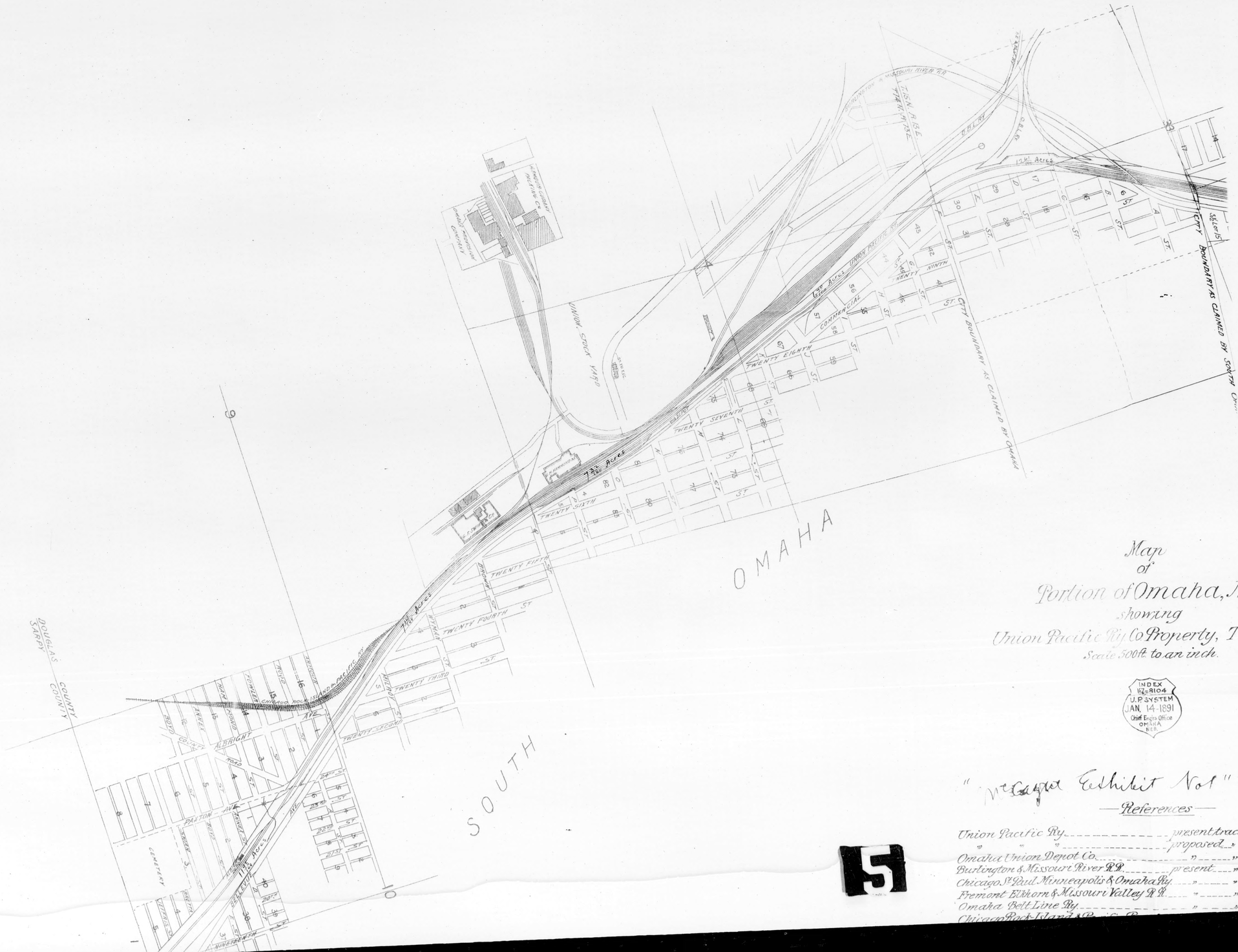
O. S. L. & U. N. RY.—Continued. SALT LAKE TO EUREKA.

Read Down				March, 1891. STATIONS.		Read Up		
Exp. A No. 1.	Mls

"Burnham's Ex. to. 2"




WILCOXS Ad
HAZEL ST
LOCUST ST
OAK ST
SPRING ST
L1
L2
L3
L4
L15
NORTH LINE SOUTH OMAHA
SOUTH OMAHA
COMMERCIAL
SOUTH OMAHA DEPOT



Map
of
Portion of Omaha, N
showing
Union Pacific Ry Co Property, Tr
Scale 500 ft. to an inch.

"Precaper Exhibit No 1"

References

Union Pacific Ry ---------- present track s
" " ---------- proposed " ---
Omaha Union Depot Co ---------- " ---------- " ---
Burlington & Missouri River R.R. ---------- present ---- " ---
Chicago St Paul Minneapolis & Omaha Ry ---- " ---------- " ---
Fremont Elkhorn & Missouri Valley R.R. ---- " ---------- " ---
Omaha Belt Line Ry ---------- " ---------- " ---
Chicago Rock Island & Pacific R.R. ---------- " ---------- " ---

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OMAHA

SOUTH OMAHA

DOUGLAS COUNTY

SARPY COUNTY

KANSAS CITY

UNION STOCK YARD

UNION PACIFIC R.R.

CITY BOUNDARY AS CLAIMED BY OMAHA

CITY BOUNDARY AS CLAIMED BY SOUTH OMAHA

COMMERCIAL

TWENTY EIGHTH

TWENTY SEVENTH

TWENTY SIXTH

TWENTY FIFTH

TWENTY FOURTH

TWENTY THIRD

TWENTY SECOND

TWENTY NINTH

ALBRIGHT ROAD

CHICAGO ROCK ISLAND & PACIFIC R.R.

BELLEVUE

CEMETERY

Map of Portion of Omaha, Neb. showing Union Pacific Ry Co Property, Track. Scale 500 ft. to an inch.

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JAN. 14-1891
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References

Union Pacific Ry ---------- present track shown
" " " ---------- proposed " ---- "
Omaha Union Depot Co ---------- " ---------- " ---- "
Burlington & Missouri River R.R. ---------- present " ---- "
Chicago St Paul Minneapolis & Omaha Ry ---------- " ---- "
Fremont Elkhorn & Missouri Valley R.R. ---------- " ---- "
Omaha Belt Line Ry ---------- " ---- "
Chicago Rock Island & Pacific Ry ---------- " ---- "
Union Stock Yard Tracks ---------- " ---- "

Map of Portion of Omaha, Neb. showing Union Pacific Ry. Co. Property, Tracks etc.

Scale 500ft to an inch.

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References

Union Pacific Ry	present track shown thus	Property thus
" " "	proposed " " "	
Omaha Union Depot Co.	" " " "	
Burlington & Missouri River R.R.	present " " "	
Chicago St Paul Minneapolis & Omaha Ry.	" " " "	
Fremont Elkhorn & Missouri Valley R.R.	" " " "	
Omaha Belt Line Ry	" " " "	
Chicago Rock Island & Pacific Ry.	" " " "	

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T.15N. R.13E.
T.14N. R.13E.

B. & M. R.R.

C.B.& Q. R.R.

Land Assn. Union Pacific Ry.

17.61/100 Acres

12.58/100 Acres

OAK ST. DEPOT

LEASED TO WEB TILE & BRICK CO.

NORTH

B.&M.R.R.

CITY BOUNDARY AS CLAIMED BY SOUTH OMAHA

CITY BOUNDARY AS CLAIMED BY OMAHA

BOULEVARD

LOT 4

ELM ST.

GREEN ST.

SPRING

OAK

PEARL

WILCOX

ELM

CHERRY

HAZEL

LINN

TWENTY FOURTH

TWENTY NINTH

TWENTY EIGHTH

TWENTY SEVENTH

COMMERCIAL

TWENTY FIRST ST.

OSEN'S ADD

TWENTIETH

NINETEENTH

EIGHTEENTH

SEVENTEENTH

CENTRE

HART HAN'S ADD.

WILLIS AVE

GEORGE ST.

Gulf's Comm.

OMAHA

Map of Portion of Omaha, Neb. showing Union Pacific Ry. Co Property, Tracks etc.

Scale 500ft to an inch.

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References

Union Pacific Ry	present track shown thus	Property thus
" " "	proposed " " "	
Omaha Union Depot Co.	" " "	
Burlington & Missouri River R.R.	present " "	
Chicago St Paul Minneapolis & Omaha Ry.	" " "	
Fremont Elkhorn & Missouri Valley R.R.	" " "	
Omaha Belt Line Ry	" " "	
Chicago Rock Island & Pacific Ry	" " "	
Union Stock Yard Tracks	" " "	

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Map
of
Portion of Omaha, Neb.
showing
Union Pacific Ry Co Property, Tracks etc.
Scale 500 ft to an inch.

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Precaptal Exhibit No 1

References

Union Pacific Ry ---- present track shown thus ——— Property thus ☐
" " " ---- proposed " " " " ———
Omaha Union Depot Co ---- " " " " ———
Burlington & Missouri River R.R. ---- present " " " ———
Chicago, St Paul Minneapolis & Omaha Ry ---- " " " " ———
Fremont Elkhorn & Missouri Valley R.R. ---- " " " " ———

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Map of Portion of Omaha, Neb. showing Union Pacific Ry. Co Property, Tracks etc.

Scale 500 ft to an inch.

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References

Union Pacific Ry	present track shown thus	Property thus
" "	proposed " " "	
Omaha Union Depot Co	" " "	
Burlington & Missouri River R.R.	present " " "	
Chicago St Paul Minneapolis & Omaha Ry	" " "	
Fremont Elkhorn & Missouri Valley R.R.	" " "	
Omaha Belt Line Ry	" " "	
Chicago Rock Island & Pacific Ry	" " "	
Union Stock Yard Tracks	" " "	

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